No. 81 6511

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

CRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Petitioners,

v.

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State, and DAVID AXELROD, individually and as New York State Commissioner of Health,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISION AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	12

APPENDIX

APPENDIX A

Opinion and Judgment of the United States Court of Appeals for the Second Circuit filed January 11, 1982. . . A-1

APPENDIX B

Opinion of the United States District Court for the Southern District filed August 18, 1981 (Summary judgment) B-1

APPENDIX C

Opinion of the United States District Court for the Southern District filed June 29, 1981 (class certification). . . . C-1

APPENDIX D

Opinion of the United States Court of Appeals for the Second Circuit filed December 9, 1980 (abstention). D-1

QUESTIONS PRESENTED

1. Does New York state violate the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution by denying law abiding minors between fourteen and eighteen, even when pregnant, any opportunity to demonstrate their capacity to marry if any one parent objects to the marriage, while affording to minors who have lied or otherwise circumvented state law to marry, a full judicial hearing on capacity to marry, even over the objection of all parents?

2. Should a subclass have been certified of out of wedlock children whose minor parents have been denied any opportunity to demonstrate their capacity to marry?

TABLE OF AUTHORITIES

CASES	Page
Allerton v. Allerton, 104 Misc. 627, 172 N.Y.S. 152 (Sup. Ct., Wayne Co. 1918)	6
Anonymous v. Anonymous, 176 Misc. 850, 29 N.Y.S.2d 331 (Fam. Ct., N.Y. Co. 1941)	6
Armstead v. Dumpson, 79 Misc. 174, 359 N.Y.S.2d 730 (Sup. Ct., Queens Co. 1974)	12
Bellotti v. Baird, 443 U.S. 622 (1979)	5,7,9
Bennett v. Jeffreys, 40 N.Y.2d 543, 387 N.Y.S.2d 821 (1976)	11
Berger v. Adornato, 76 Misc.2d 122, 350 N.Y.S.2d 520 (Sup. Ct. Onondaga Co. 1973)	7
Board of Regents v. Roth, 408 U.S. 564 (1972)	8
Breed v. Jones, 421 U.S. 519 (1975)	7
Brown v. Board of Education, 347 U.S. 483 (1954)	7
Brown v. Brown, 51 Misc. 839, 274 N.Y.S.2d 484 (Fam. Ct., N.Y. Co. 1966)	6
Carey v. Population Services International, 431 U.S. 678 (1977)	7
Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974)	8
Cochran v. Cochran, 196 N.Y. 86, 89 N.E. 470 (1909)	12
In re Commissioner of Social Services, 98 Misc.2d 450, 414 N.Y.S.2d 76 (Fam. Ct., N.Y. Co. 1978)	10
Ellen N. v. Stuart K., 88 Misc.2d 280, 387 N.Y.S.2d 367 (Fam. Ct., Onondaga Co. 1976)	10
In re Gault, 382 U.S. 1 (1966)	7
Goss v. Lopez, 419 U.S. 565 (1975)	7,8
Labine v. Vincent, 401 U.S. 532 (1971)	10
Lalli v. Lalli, 439 U.S. 259 (1978)	10
Loving v. Virginia, 308 U.S. 1 (1976)	5
Magee v. Nealson, 108 Misc. 396, 177 N.Y.S. 517 (Sup. Ct., Steuben Co. 1919)	6
Matturro v. Matturro, 281 A.D. 695, 117 N.Y.S.2d 523 (2d Dept. 1952)	6
Matturro v. Matturro, 111 N.Y.S.2d 533 (Sup. Ct., Westchester Co. 1952)	6

TABLE OF AUTHORITIES

CASES	Page
Maynard v. Hill, 125 U.S. 190 (1888)	5
Moe v. Dinkins, 635 F.2d 1045 (2d Cir. 1980)	2,7,10
In re Palumbo, 172 Misc. 55, 14 N.Y.S.2d 329 (Dom. Rel. Ct., N.Y. Co. 1939)	12
Parham v. Hughes, 441 U.S. 347 (1979)	10,11
Parham v. J.R., 442 U.S. 584 (1979)	7
Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)	5,7,9
In re Powers, 96 Misc.2d 183, 408 N.Y.S.2d 761 (Fam. Ct. Yates Co. 1978)	7
Roe v. Wade, 410 U.S. 113 (1973)	9,10
Short v. Hotaling, 32 Misc.2d 933, 225 N.Y.S.2d 53 (Sup. Ct. Kings Co. 1962)	6
Skinner v. Oklahoma, 316 U.S. 535 (1942)	5
Stanley v. Illinois, 405 U.S. 645 (1972)	8
In re Suzanne Y., 92 Misc.2d 652, 401 N.Y.S.2d 383 (Fam. Ct. N.Y. Co. 1977)	11
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)	7
Trimble v. Gordon, 430 U.S. 762 (1977)	10
Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972)	9
In re Winship, 397 U.S. 358 (1970)	7
Zablocki v. Redhail, 434 U.S. 374 (1978)	5,9

UNITED STATES CONSTITUTION	
Fourteenth Amendment	2

FEDERAL STATUTES	
28 U.S.C. §1254	2
28 U.S.C. §1343	4
42 U.S.C. §402	10

TABLE OF AUTHORITIES

NEW YORK STATE STATUTES — **Page**

N.Y. Dom. Rel. Law §7 (McKinney 1977) 3,6

N.Y. Dom. Rel. Law §13 (McKinney 1977) 3

N.Y. Dom. Rel. Law §15 (McKinney 1977) 3,6

N.Y. Dom. Rel. Law §24 (McKinney 1977) 3

N.Y. Dom. Rel. Law §33 (McKinney 1977) 10,11

N.Y. Est., Powers & Trust Law §4-1.1 (McKinney 1981) . . 10

N.Y. Est., Powers & Trust Law §4-1.2 (McKinney 1981) . . 10

N.Y. Fam. Ct. Act §413 (McKinney Supp. 1980-1981) . . . 10

N.Y. Fam. Ct. Act. §545 (McKinney 1975) 10

N.Y. Fam. Ct. Act §§1011-1015 (McKinney 1975 and Supp. 1980-1981) 11

N.Y. Gen. Obl. Law §3-101, subd. 3 (McKinney 1978) . . . 11

N.Y. Gen. Obl. Law §3-102, subd. 1 (McKinney 1978) . . . 11

N.Y. Gen. Obl. Law §3-109 (McKinney 1978) 12

N.Y. Publ. Health Law §2504, subd. 1 (McKinney 1977) . . 11

N.Y. Work. Comp. Law §15 (McKinney 1965 and Supp. 1981-1982) 10

No.

IN THE
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OCTOBER TERM 1981

CRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Petitioners,

v.

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State, and DAVID AXELROD, individually and as New York State Commissioner of Health,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Petitioners Cristina Coe and Pedro Doe* respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit filed on January 11, 1982.

* Maria Moe, Raoul and Ricardo Roe were also plaintiffs-appellants in the case below. They have decided not to appeal here. All other parties in the case below are listed in the above caption. All plaintiffs were granted the right to proceed pseudonymously by the district court.

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Second Circuit filed January 11, 1982 upheld the constitutionality of New York's scheme which denies law abiding minors, even when pregnant, any opportunity to demonstrate their capacity to marry if one parent withholds consent (unreported, attached as Appendix A). In doing so the court affirmed the decision of the United States District Court for the Southern District filed August 18, 1981 (unreported, attached as Appendix B). The District Court in a decision filed June 29, 1981 had previously granted certification of a defendant and plaintiff class but had refused to include in the plaintiff class a subclass of out of wedlock children born to minors who were denied an opportunity to demonstrate their capacity to marry (unreported, attached as Appendix C). The District Court decisions were made after the Court of Appeals had reversed and remanded on the issue of abstention (Moe v. Dinkins, 635 F.2d 1045 (2d Cir. 1980), attached as Appendix D).

JURISDICTION

The judgment and opinion for the Court of Appeals for the Second Circuit were filed on January 11, 1982. This petition is timely filed within ninety days of that date.

This court's juridsiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.

New York Domestic Relations Law §7 (McKinney 1977) provides in relevant part:

> A marriage is void from the time its nully is declared by a court of competent jurisdiction if either party hereto:
>
> 1. Is under the age of legal consent ... provided that such nonage shall not of itself constitute an absolute right to the annulment of such marriage, but such annulment shall be in the discretion of the court which shall take into consideration all the facts and circumstances surrounding such marriage;

New York Domestic Relations Law §13 (McKinney 1977) provides in relevant part:

> It shall be necessary for all persons intended to be married in New York state to obtain a marriage license ....

New York Domestic Relations Law §15 (McKinney 1977) provides in relevant part:

> If ... the man is under eighteen years of age and is not under sixteen years of age, or ... the woman is under the age of eighteen and is not under fourteen years of age, then the town or city clerk before he shall issue a license shall require the written consent to the marriage from both parents of the minor or minors ....

New York Domestic Relations Law §24 (McKinney 1977) provides in relevant part:

> A child ... born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage ... is the legitimate child of both natural parents ....

STATEMENT OF THE CASE

Cristina Coe, sixteen years of age, and Pedro Doe, seventeen years of age, are the parents of an infant, Daniel, born in August 1981. They live together in their own apartment and Pedro's salary supports the family.

After Cristina discovered she was pregnant she and Pedro informed her mother of their desire to marry. Mrs. Coe insisted that Cristina have an abortion and refused to consent

to the marriage. When Cristina refused to keep two appointments Mrs. Coe had made for Cristina at an abortion clinic, Mrs. Coe informed Cristina that she wanted nothing more to do with Cristina and that Mrs. Coe was leaving the country. From February 1981 to June 1981 Cristina did not see or hear from her mother. By happenstance, in June 1981, Cristina saw her mother on the street and her mother ignored Cristina and passed by.

Cristina and Pedro wanted to marry before their child was born so that the child would never have to bear the stigma of illegitimacy. They also wanted to marry to express their caring for each other, legitimate their relationship and raise their child in accord with their beliefs in a traditional family unit. Both of Pedro's parents consented to the proposed marriage.

Pedro and Cristina sought and received the assistance of a certified social worker in planning for their life together, their marriage and the birth of their child. They joined and participated in an extensive pre-natal and post-natal program to prepare them for childbirth and parenthood. Hospital delivery of their child was recommended by the nurse-midwife who worked with Cristina in this program. Because of her unmarried status Cristina was not eligible for coverage of her hospital delivery through any health insurance associated with Pedro's employment or Medicaid and she had great difficulty making appropriate arrangements. This created a health hazard for Cristina and her expected child and caused her great stress and anxiety.

In an attempt to accomplish their goal of marrying before their child was born, Cristina and Pedro made a motion to intervene as additional class representatives in the pending case of Moe v. Dinkins. The case was brought pursuant to 28 U.S.C. §1343(3), challenging the New York State scheme as violative of rights guaranteed by the United States Constitution. They also made a motion to decide the pending motions in the case or issue a preliminary injunction before July 26, 1981,

the projected due date of their child. On June 29, 1981 the district court certified a plaintiff and defendant class but denied certification of a subclass of children of minor parents. On August 18, 1981 the district court granted the motion for Cristina and Pedro's intervention, denied plaintiffs' motion for summary judgment and granted summary judgment in favor of defendants.

REASONS FOR GRANTING THE WRIT

The Court of Appeals ignored this Court's holdings on the rights of minors, out of wedlock children and parents and the basic concept of procedural due process. The perpetuation of such error not only adversely affects Cristina, Pedro, their child and other families like them in New York. It undermines the well established concept of procedural due process. Also, in conjunction with holdings of this Court, it conveys a message to the numerous minors in this country confronted with pregnancy. Bellotti v. Baird, 443 U.S. 622 (1979); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976). That message is that abortion is their only constitutionally protected option and that they have no protectable interest in the well being of their children if born. The alternative which is considered a basic civil right, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), "essential to the orderly pursuit of happiness by free men," Loving v. Virginia, 308 U.S. 1, 12 (1976), "the foundation of the family," Maynard v. Hill, 125 U.S. 190, 211 (1888), and the only socially recognized and legally sanctioned context for child rearing, see Zablocki v. Redhail, 434 U.S. 374, 386, 390 (1978), is foreclosed to them. They may not even have access to any forum where they could attempt to demonstrate their capacity for marriage.

New York State has recognized the general capacity of women between fourteen and eighteen and men between sixteen

and eighteen to marry. N.Y. Dom. Rel. Law §§7, 15 (McKinney 1977); Matturro v. Matturro, 111 N.Y.S.2d 533 (Sup. Ct., Westchester Co. 1952); Matturro v. Matturro, 281 A.D. 695, 117 N.Y.S.2d 523 (2d Dept. 1952); Anonymous v. Anonymous, 176 Misc. 850, 29 N.Y.S.2d 331 (Fam. Ct., N.Y. Co. 1941); Brown v. Brown, 51 Misc.2d 839, 274 N.Y.S.2d 484 (Fam. Ct., N.Y. Co. 1966). However, only those minors who lie or otherwise circumvent New York State law to marry are afforded a hearing to determine their individual capacity to marry. N.Y. Dom. Rel. Law §7 (McKinney 1977); Matturro v. Matturro, Anonymous v. Anonymous, Brown v. Brown. The fact of nonage and lack of parental consent does not make a marriage void. If the marriage is challenged a judicial hearing is held to consider all the facts and circumstances surrounding the marriage even if all parents of the minors object. The judicial standard applied is that "[t]he marital status should be upheld, when the underaged persons involved show willingness and capacity for enduring marital life and for the building of a family unit." Short v. Hotaling, 32 Misc.2d 933, 934, 225 N.Y.S.2d 53, 55 (Sup. Ct., Kings Co. 1962). Accord, Magee v. Nealson, 108 Misc. 396, 177 N.Y.S. 517 (Sup. Ct., Steuben Co. 1919); Allerton v. Allerton, 104 Misc. 627, 172 N.Y.S. 152 (Sup. Ct., Wayne Co. 1918).

In contrast, law abiding minors who seek to marry are denied any opportunity to demonstrate their capacity to marry if only one parent in four will not go to the clerk's office and give her prior written consent. N.Y. Dom. Rel. Law §15. Affirmative written consent is required from any parent regardless of the circumstances. A parent like Cristina's, who does not live with, support or care for her daughter and who has abdicated all parental responsibility can veto the marriage. If one parent is insane and incapable of reasoned consent, that parent's affirmative permission is still required. A court appointed guardian cannot give consent in the parent's stead.

Moe v. Dinkins, 635 F.2d 1045, 1048-49 (2d Cir. 1980). The minors may be themselves parents or expecting a child. The one parent may refuse consent for any arbitrary reason or no reason at all. Moe v. Dinkins, 635 F.2d 1045, 1048 (2d Cir. 1980); In re Powers, 96 Misc.2d 183, 408 N.Y.S.2d 761 (Fam. Ct. Yates Co. 1978); Berger v. Adornato, 76 Misc.2d 122, 350 N.Y.S.2d 520 (Sup. Ct. Onondaga Co. 1973). Where one parent withholds consent, the other parents, the minors and their children are given no opportunity to have their concerns and desires heard. Further, the children born to minors who are barred from an opportunity to demonstrate their capacity to marry are condemned by New York to the status of illegitimacy. N.Y. Dom. Rel. Law §24, subd. 1 (McKinney 1977).

This court has held that minors as well as adults are persons protected by the Constitution. Parham v. J.R., 442 U.S. 584 (1979); Bellotti v. Baird, 443 U.S. 622 (1979); Carey v. Population Services International, 431 U.S. 678 (1977); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Breed v. Jones, 421 U.S. 519 (1975); Goss v. Lopez, 419 U.S. 565 (1975); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969); In re Winship, 397 U.S. 358 (1970); In re Gault, 387 U.S. 1 (1966); Brown v. Board of Education, 347 U.S. 483 (1954).

> Constitutional rights do not mature and come into being magically only when one attains the state defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.

Planned Parenthood at 74.

Specifically minors have a constitutional right to procedural due process. Parham v. J.R., 442 U.S. 584 (1979); Goss v. Lopez, 419 U.S. 565 (1975). This court has made it clear that when there is any deprivation of a person's life, liberty or property, procedural due process requirements apply. Parham v. J.R., 442 U.S. 584 (1979); Goss v. Lopez, 419 U.S. 565

(1975); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972). It is the nature of the interest at stake, not the weight, which determines whether due process applies. Consideration of the length and severity of a deprivation is relevant only when determining the appropriate form of the procedure required . Goss at 577; Board of Regents v. Roth, 408 U.S. 564 (1972).

The Court of Appeals ignored Cristina and Pedro's claim for procedural due process and applied instead an equal protection analysis, holding that a rational relationship test rather than strict scrutiny test was appropriate because "the right of minors to marry has not been viewed as a fundamental right deserving strict scrutiny" (Appendix A, p. 5). Whether Cristina and Pedro's interest in the well being of their child and the legality of their relationship is viewed as a fundamental interest has no bearing on their procedural due process claim. They had a liberty interest in preventing their child from being born illegitimate, raising him in a legally sanctioned family and legitimating their relationship through marriage. See Zablocki v. Redhail, 434 U.S. 384, 386 (1978). Therefore some process is due.* The Court of Appeals decision if allowed to

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* The Court of Appeals equal protection analysis was also erroneous. Under the New York scheme and the relief requested in the case, the classifications to be compared are not minors as versus adults but minors versus minors. Minors who lie or otherwise circumvent state law are allowed to marry and if challenged are afforded a full judicial hearing on their capacity to marry despite parental objection while law abiding minors are not. The plaintiffs in this case did not seek an absolute right to marry like that afforded adults. They requested only that they, like other minors, be afforded the opportunity to demonstrate their capacity to marry. Denying them this opportunity violates equal protection regardless of what standard is applied. It is irrational to afford a hearing to persons who lie and circumvent state law and not provide the same opportunity to persons who are honest and attempt to subject themselves to the law.

stand would mean that parents merely because of their age do not have a liberty interest in the well being of their children and that persons merely because of their age do not have a liberty interest in maintaining a family relationship in the only legally and societally recognized manner, through marriage. Thus, a minor's constitutionally protected privacy interest would extend only to the option of abortion. This court has recognized that it is a nationwide biological fact that women become pregnant before the age of majority and has held that minors have a constitutional right to choose abortion. Bellotti v. Baird, 443 U.S. 622 (1979); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976). The Court of Appeals decision forecloses a pregnant minor's alternative to an abortion, marriage and the bearing of a legitimate child into a legally sanctioned family.

The time difference involved between these two alternatives is minimal. A woman desiring an abortion must obtain one within twenty-four weeks or about five and a half months. Roe v. Wade, 410 U.S. 113 (1973). A woman wishing to bear a legitimate child must marry within nine months. If a woman cannot marry before her child is born, she and her child are forever burdened with the stigma of illegitimate birth. The fact that a child may be legitimated by marriage several years after birth does not remove the stigma of birth out of wedlock, nor does it remove the social, legal and economic liabilities that the child and his parents must suffer during those intervening years.

This court has recognized that illegitimate children are a disfavored class in our society, "hapless children" forced to suffer "societal approbation," Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 176 (1972), and innocent pawns to the stigma of bastardy. Zablocki v. Redhail, 434 U.S. 374, 386 (1978). Illegitimacy also handicaps their legal position in the world. For example, illegitimates are only legally entitled

to a "fair and reasonable sum" from their fathers for their support and only after a filiation proceeding and an order of support is issued. N.Y. Dom. Rel. Law §33, subd. 5 (McKinney 1977), N.Y. Fam. Ct. Act §545 (McKinney 1975); In re Commissioner of Social Services, 98 Misc.2d 450, 414 N.Y.S.2d 76 (Fam. Ct., N.Y. Co. 1978); Ellen N. v. Stuart K., 88 Misc.2d 280, 387 N.Y.S.2d 367 (Fam. Ct., Onondaga Co. 1976). Legitimate children are entitled to support in accordance with the "means" of the father. N.Y. Fam. Ct. Act §413 (McKinney Supp. 1980-1981). And if a minor father died intestate before he was able to marry, his illegitimate child would not inherit from him. N.Y. Est., Powers & Trusts Law §4-1.2 (McKinney 1981); Lalli v. Lalli, 439 U.S. 259 (1978).

Unwed mothers must suffer the legal status of "concubine," see Labine v. Vincent, 401 U.S. 532, 538 (1971) and are subjected to "society's condemnation," Parham v. Hughes, 441 U.S. 347, 351-52 (1979), and the "difficulties and continuing stigma of unwed motherhood," Roe v. Wade, 410 U.S. 113, 153, each and every day they are prevented from marrying the fathers of their infants. See Trimble v. Gordon, 430 U.S. 762, 768-70 and n.13 (1977).

While unwed mothers bear the responsibilities of wife and mother, they are denied all attendant rights that assist the fullfillment of these responsibilities. They may not collect Workmen's Compensation, N.Y. Work. Comp. Law §15 (McKinney 1965 and Supp. 1981-1982); or Social Security benefits, 42 U.S.C. §402 (1976); and they possess no intestate succession rights, N.Y. Est., Powers & Trust Law §4-1.1 (McKinney 1981). Moe v. Dinkins, 635 F.2d at 1047 n.5. They have no enforceable right to financial support from the fathers of their children. See Ellen N. v. Stuart K., 88 Misc.2d 280, 387 N.Y.S.2d 367 (Fam. Ct., Onondaga Co. 1976). They cannot qualify for employment related benefits, such as health insurance as the respective spouse of their childrens fathers. If the fathers die or become

disabled, unwed mothers are left totally responsible for themselves and their helpless infants without the economic protection afforded wives and inwedlock mothers. See N.Y. Dom. Rel. Law §33, subd. 5 (McKinney 1977).

Similarly, unwed minor fathers suffer the social condemnation of unwed fatherhood, even when they sought to marry their respective mates and legitimate their children. This court held that it was constitutional to discriminate against an out of wedlock father on the basis of his irresponsibility in failing to legitimate his child. Parham v. Hughes, 441 U.S. 437 (1979). Thus a minor father like Pedro is condemned and discriminated against by a state because his child was born out of wedlock. Yet at the same time, the State denies him any opportunity to demonstrate his capactiy for the only act which would have prevented the illegitimate birth, marriage.

Further, unmarried status jeopardizes the minors' ability to support their children. All parents must adequately support, house, clothe and attend to the medical needs of their children. If they fail to do so they may be subjected to neglect proceedings and deemed unfit parents warranting the removal of their children from their custody. N.Y. Fam. Ct. Act §1011-1015 (McKinney 1975 and Supp. 1980-1981). See generally Bennett v. Jeffreys, 40 N.Y.2d 543, 387 N.Y.S.2d 821 (1976); In re Suzanne Y., 92 Misc.2d 652, 401 N.Y.S.2d 383 (Fam. Ct., N.Y. Co. 1977). Yet unmarried status frustrates efforts to meet these obligations. If married, minor parents like Cristina and Pedro could enter a lease or buy real property, N.Y. Gen. Obl. Law §3-101, subd. 3 (McKinney 1978), undertake obligations for hospital, medical, and surgical treatment and care, N.Y. Gen. Obl. Law §3-102, subd. 1 (McKinney 1978), or consent to personal medical, dental, health and hospital services, N.Y. Publ. Health Law §2504, subd. 1 (McKinney 1977). Unwed minor parents, unlike married minors, do not have an exclusive claim over any of their

earnings and services. Any of their parents can lay claim over their wages by filing written notice with their employers. N.Y. Gen. Obl. Law §3-109 (McKinney 1978). Cochran v. Cochran, 196 N.Y. 86, 89 N.E. 470 (1909); Armstead v. Dumpson, 79 Misc.2d 174, 359 N.Y.S.2d 730 (Sup. Ct., Queens Co. 1974); In re Palumbo, 172 Misc. 55, 14 N.Y.S.2d 329 (Dom. Rel. Ct., N.Y. Co. 1939).

Thus, maintenance of the Court of Appeals decision gives the following message to the numerous minors in this country who are confronted with pregnancy: you may have an abortion, you may bring a child into life to suffer the myriad liabilitites of illegitimacy and you will be forced, even when you are eager to marry and legitimate your child, to suffer the social, legal and practical disabilities of unmarried parenthood, but you may not have the opportunity to demonstrate your capacity for the mature and socially responsible option of taking responsibility for the consequences of your actions, marrying and preventing the attachment of the stigma of illegitimacy to your child and your relationship.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Judgment and Opinion of the United States Court of Appeals for the Second Circuit, filed January 11, 1982

APPENDIX B

Opinion of the United States District Court for the Southern District, filed August 18, 1981 (Summary Judgment)

APPENDIX C

Opinion of the United States District Court for the Southern District, filed June 29, 1981 (Class Certification)

APPENDIX D

Opinion of the United States Court of Appeals for the Second Circuit, filed December 9, 1980 (Abstention)

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of January one thousand nine hundred and eighty-two

Present:

HON. LEONARD P. MOORE,

HON. IRVING R. KAUFMAN,

HON. VAN GRAAFEILAND,

Circuit Judges,

U.S. DISTRICT COURT FILED FEB 5 1982 S.D. OF N.Y.

UNITED STATES COURT OF APPEALS FILED JAN 11 1982 A. DANIEL FUSARO, CLERK SECOND CIRCUIT

81-7588
81-7636

MARIE MOE, RAOUL ROE, RICHARD ROE, an infant, by his father RAOUL ROE, on behalf of themselves and all other persons similarly situated,

Plaintiffs-Appellants-Cross-Appellees,

and

CHRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Plaintiffs-Intervenors-Appellants-Cross-Appellees,

v

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State,

Defendants,

and

DAVID AXELROD, individually and as New York State Commissioner of Health,

Defendants-Appellees-Cross-Appellants.

#81-7588
81-7636

SDNY #

80 Civ 1577 (CBM)

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District Court of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments and orders of said District Court be and they hereby are affirmed in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk

JUDGMENT ENTERED 2/5/82 by Arthur Heller, Deputy Clerk

Raymond F. Burghardt
CLERK

A TRUE COPY
A. DANIEL FUSARO, CLERK
By Francis X. Gindhart

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 520, 630—August Term, 1981

(Argued: January 8, 1982 Decided: January 11, 1982)

Docket Nos. 81-7588, 81-7636

MARIE MOE, RAOUL ROE, RICHARD ROE, an infant, by his father RAOUL ROE, on behalf of themselves and all other persons similarly situated,

Plaintiffs-Appellants-Cross-Appellees,

—and—

CHRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Plaintiffs-Intervenors-Appellants-Cross-Appellees,

—against—

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State,

Defendants,

—and—

DAVID AXELROD, individually and as New York State Commissioner of Health,

Defendants-Appellees-Cross-Appellants.

Before:

MOORE, KAUFMAN and VAN GRAAFEILAND, *Circuit Judges.*

Appeal from a judgment and orders entered in the United States District Court for the Southern District of New York, Constance Baker Motley, *Judge*, (1) granting defendants' motion for summary judgment and dismissing plaintiffs' complaint, and (2) denying plaintiffs' motion for certification of a subclass of out-of-wedlock children whose parents are barred from marriage pursuant to New York Domestic Relations Law § 15.

Cross-appeal from the same judgment and orders (1) denying defendants' motion to dismiss with a request for disclosure of the identities of the plaintiffs, (2) granting plaintiffs' motion to certify plaintiff classes, and (3) granting leave to Christina Coe and Pedro Doe to intervene and proceed without disclosing their identities.

Affirmed.

JANET M. CALVO, New York, New York (Amy L. Beckett, Marjorie E. McAboy, Peter A. Triandifilou, Washington Square Legal Services, Inc., New York, N.Y., *of Counsel*), *for Plaintiffs-Appellants-Cross-Appellees* and *Plaintiffs-Intervenors-Appellants-Cross-Appellees*,

ROBERT J. SCHACK, Assistant Attorney General of the State of New York, New York, New York, (Robert Abrams, Attorney General of the State of New York, George D. Zuckerman, Assistant Solicitor General of the State of New York, New York, New York *of Counsel*), *for Defendants-Appellees-Cross-Appellants*.

Per Curiam:

Marie Moe, Raoul Roe, Richard Roe, Christina Coe and Pedro Doe (hereinafter "Moe"), on behalf of themselves and others similarly situated, appeal (1) from an order and

judgment entered by Judge Motley granting defendants' motion for summary judgment and dismissing Moe's complaint, and (2) from her order denying Moe's motion for certification of a subclass of out-of-wedlock children whose parents are barred from marriage pursuant to New York Domestic Relations Law § 15. David Axelrod, individually and as New York State Commissioner of Health, cross-appeals (1) from Judge Motley's order denying his motion to dismiss with a request for disclosure of the identities of the plaintiffs, (2) from the trial court's order granting Moe's motion to certify plaintiff classes, and (3) from the order and judgment granting leave to Christina Coe and Pedro Doe to intervene and proceed without disclosing their identities. We affirm in all respects, substantially for the reasons stated in Judge Motley's thorough and well-reasoned opinion. In view of the novel and significant questions raised by Moe's claim that the New York parental consent requirements for the marriage of minors are unconstitutional, we add the following.

Moe asserts a deprivation of liberty guaranteed by the Due Process Clause of the Fourteenth Amendment of the United States Constitution as a result of the operation of New York Domestic Relations Law § 15 (14 McKinney, 1977). New York law requires that all male applicants for a marriage license between ages 16 and 18 and all female applicants between ages 14 and 18 must obtain the consent of their parents, and that a female between ages 14 and 16 must obtain judicial approval as well as parental consent. *Id.*, §§ 15.2, 15.3. Intimate activities concerning marriage and family relations have long been accorded stringent judicial protection on the ground that such activities implicate rights of privacy protected by the Due Process Clause of the United States Constitution. *See, e.g., Zablocki* v. *Redhail*, 434 U.S. 374 (1978); *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942). While courts have subjected certain restrictions on the right to marry to heightened scrutiny, *see, e.g., Zablocki* v. *Redhail*, *supra* (statute provided that failure to comply with child

support orders precluded a parent from marrying without court permission); *Loving* v. *Virginia*, 388 U.S. 1 (1967) (antimiscegenation statute unconstitutionally infringed right to marry), the right of minors to marry has not been viewed as a fundamental right deserving strict scrutiny. Accordingly, Judge Motley was correct in testing the constitutionality of New York Domestic Relations Law § 15 by determining whether there exists a rational relation between the means chosen by the New York legislature and legitimate state interests in adopting and enforcing the restriction.[1] In light of New York's important interest in promoting the welfare of children by preventing unstable marriages among those lacking the capacity to act in their own best interests, *see Addington* v. *Texas*, 441 U.S. 418, 426 (1979), we agree with Judge Motley that the New York statutory scheme passes constitutional muster.

Accordingly, we affirm in all respects.

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[1] In a case involving minors who desire to marry as a means of granting legitimacy to their child, the New York statutory scheme provides relief. New York Domestic Relations Law § 24(1) states that the subsequent marriage of the parents confers legitimacy upon a child born prior to the marriage. Furthermore, the effect of out-of-wedlock birth may be erased by adoption of the child pursuant to New York Domestic Relations Law § 117(1). Accordingly, the New York statute provides at least two avenues by which minor parents of a child born prior to the time at which they can enter a valid legal marriage can ensure that the child will not suffer from acts or omissions of the parents.

It should also be noted that Section 15's requirement of parental consent applies to all minors within the statutory age categories, not just those with illegitimate children. As a result, the New York statutory scheme cannot be viewed as an attempt to punish minors with illegitimate children.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MARIA MOE, RAOUL ROE, and RICHARD ROE, an infant, by his father RAOUL ROE, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

-against-

80 CIV. 1577 (CBM)

DAVID DINKINS, individually, and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State, and DAVID AXELROD, individually, and as New York State Commissioner of Health,

Defendants.

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CONSTANCE BAKER MOTLEY, D. J.

MEMORANDUM OPINION

Plaintiffs Maria Moe, Raoul Roe and Ricardo Roe seek a judgment declaring unconstitutional, and enjoining the enforcement of, the parental consent requirement of New York Domestic Relations Law §§ 15.2 and 15.3 (Section 15). Section 15.2 provides that all male applicants for a marriage license between ages 16 and 18 and all female applicants between ages 14 and 18 must obtain "written consent to the marriage from both parents of the minor or minors or such as shall then be living. . . ." Section 15.3 requires that a woman between ages 14 and 16 obtain judicial approval of the marriage, as well as the parental consent required by Section 15.2.

This action is now before the court on plaintiffs' motion for summary judgment declaring Section 15 unconstitutional and enjoining its enforcement. Plaintiffs' motion came on for hearing after this case had been remanded to this court by the Court of Appeals for this Circuit. The Court of Appeals reversed this court's initial determination that it should abstain from deciding the constitutionality Section 15 until the statute had been construed by the New York State courts. Moe v. Dinkins, 635 F.2d 1045 (2d Cir. 1980).

Prior to the hearing on plaintiffs' motion for summary judgment, this court filed a memorandum opinion and order which granted in part plaintiffs' motion to certify a plaintiff

and a defendant class. Moe v. Dinkins, No. 80 Civ. 1577 (S.D.N.Y. June 29, 1981). The plaintiff class consists of:

> persons who wish to marry in New York State but cannot obtain a marriage license or judicial approval to obtain a marriage license because they, or the persons whom they seek to marry, lack parental consent as required by New York Dom. Rel Law §§ 15.2 and 15.3.

The plaintiff class is represented by Maria Moe and Raoul Roe. The defendant class consists of:

> all town and city clerks in New York State. All such clerks are required by New York State law to enforce the parental consent provisions of New York Dom. Rel. Law §§ 15.2 and 15.3.

The defendant class is represented by David Dinkins, City Clerk of New York City. David Axelrod, New York State Commissioner of Health, is also a defendant in this action.

Plaintiff Raoul Roe was eighteen years old when this action was commenced. Plaintiff Maria Moe was fifteen years old. Plaintiff Ricardo Roe is their one year old son who was born out of wedlock. Plaintiffs live together as an independent family unit. In late November, 1978, Maria became pregnant by Raoul and in April, 1979, they moved into an apartment together. Maria requested consent from her mother, a widow, to marry Raoul, but Mrs. Moe refused, allegedly

because she wishes to continue receiving welfare benefits for Maria. Maria and Raoul continue to be prevented from marrying because of Mrs. Moe's failure to give consent to the marriage as required by Section 15. Maria and Raoul allege that they wish to marry in order to cement their family unit and to remove the stigma of illegitimacy from their son, Ricardo.

In addition, Cristina Coe and Pedro Doe have moved to intervene as plaintiffs and additional class representatives in this action, pursuant to Fed. R. Civ. P. 24(b)(2), and for an order allowing them to proceed with this action under pseudonyms and without appointment of a guardian ad litem.

For the reasons discussed below, the motion for intervention is granted. Plaintiffs' motion for summary judgment declaring Section 15 unconstitutional is denied. This court holds that the parental consent requirement of Section 15 does not violate plaintiffs' constitutional rights.

Intervention

Proposed plaintiff-intervenor Cristina Coe is fifteen years old. Proposed plaintiff-intervenor Pedro Doe is seventeen years old. Cristina is eight months pregnant with Pedro's child. Cristina and Pedro reside in the home of Pedro's father and step-mother. In January 1981, when Cristina discovered she was pregnant, she and Pedro informed Cristina's mother of their desire to have their child and to marry. Mrs. Coe refused to give Cristina her consent to marry and arranged for Cristina to have an abortion. Cristina refused to keep the appointments her mother made for her at the abortion clinic. Consequently, Mrs. Coe told Cristina she wanted to have nothing more to do with her and that she was leaving the country to live in the Dominican Republic.

Cristina and Pedro wish to marry to express their commitment to and caring for each other, to legitimate their relationship, and to raise their child in accord with their beliefs in a traditional family setting sanctioned by law. They wish to marry before their child is born so that he or she will never have the stigma of illegitimacy attached to his or her life. However, Cristina and Pedro are precluded from petitioning for judicial approval to obtain

a marriage license by operation of Section 15 because Mrs. Coe, Christina's custodial parent, refuses to consent to the marriage.

Rule 24(b)(2) of the Federal Rules of Civil Procedure allows permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common. . . ." The rule further provides that "[i]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

The claims of Cristina and Pedro present the same legal issue presented by the present plaintiffs — whether the parental consent requirement of Section 15 is constitutional. Like plaintiffs Maria Moe and Raoul Roe, Cristina and Pedro wish to marry in order to cement their family unit and raise their child without the stigma of illegitimacy. Like Maria and Raoul, Cristina and Pedro are prevented from marrying by the parental veto imposed by Section 15. Intervention will not result in any delay or prejudice to the rights of the original parties or to the orderly process of this court.

In addition, plaintiffs argue that the intervention of Pedro and Cristina will present the court with a more complete picture of the impact of Section 15's parental consent requirement and will add to the representativeness of the named class members. Section 15 requires that Maria, who is now sixteen, must have parental consent to obtain a marriage license. Section 15 requires

that Cristina must obtain judicial approval to marry, but precludes her from petitioning for judicial approval unless her parent has consented. While Maria has already borne a child, Cristina is now expecting a baby and is thus in a position to totally avoid the stigma of illegitimacy for her child.

Defendants object to the intervention of Cristina and Pedro on two grounds. First, defendants contend that Cristina and Pedro do not belong in the plaintiff class because New York law provides them with a means to obtain a marriage license without Cristina's mother's consent. Second, defendants argue that plaintiffs' motion for intervention should be denied because Cristina and Pedro have failed to reveal their true identities to defendants. The court finds both objections to be without merit.

Defendants state that under the New York Social Services Law a child less than eighteen years old may be declared abandoned by his or her parent. In that case, defendants contend, the Surrogate may grant letters of guardianship for the purpose of consenting to the teenager's marriage if marriage would be in the teenager's best interests. Defendants' contention is contrary to the ruling of the Court of Appeals in Moe v. Dinkins, supra, 635 F.2d at 1049, that in New York "the consent of a court-appointed guardian cannot bypass the statutory requirement of parental consent, regardless of the unfairness created by a refusal to grant permission." In that decision, the Court of Appeals rejected each of the alternative constructions of Section 15 posed by defendants which might allow an exception to the parental consent requirement.

Cristina's and Pedro's failure to reveal to defendants their true identies does not bar their intervention in this action. It is common for plaintiffs, both minors and those over the age of majority, to be permitted to proceed under a pseudonym where the case concerns matters of a highly sensitive and personal nature such as marriage and illegitimacy. See, e.g., Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973) (abortion); Doe v. Lavine, 347 F. Supp. 357 (S.D.N.Y. 1972) (identification of putative fathers of illegitimate children); Child v. Beame, 412 F. Supp. 593 (S.D.N.Y. 1976) (minors' suit against foster care agencies).

Defendants claim that the secrecy surrounding Cristina and Pedro precludes them from verifying the standing of Christina and Pedro to challenge the constitutionality of Section 15. However, standing depends on what the complaint alleges. H.L. v. Matheson, 101 S. Ct. --, ___ (1981) (Powell, J., concurring); Warth v. Seldin, 422 U.S. 490, 498, 501 (1975). The proposed intervenor complaint filed by Cristina and Pedro alleges sufficient facts to demonstrate that they have the personal stake in the outcome of the controversy needed to confer standing. See Warth v. Seldin, supra, 422 U.S. at 498. In addition, both proposed intervenors have submitted sealed affidavits, signed in their true names, which attest to the accuracy of the allegations of the complaint. Plaintiffs' attorney has also filed an affidavit which states that Cristina and Pedro are real people who she has interviewed. Plaintiffs' attorney's signature on the intervenor

complaint further warrants that, to the best of her knowledge, the allegations are true. See Fed. R. Civ. P. 11.

For these reasons, the court holds that Cristina Coe and Pedro Doe may intervene in this action and may proceed under pseudonyms. Their request to proceed without the appointment of a guardian ad litem is also granted since their interests in the litigation are adequately protected by representation by competent counsel. See Baird v. Bellotti, 393 F. Supp. 847, 850 n.5 (D. Mass 1975), vacated on other grounds, 428 U.S. 132 (1976).

Since the facts which the defendants dispute are not material to the constitutional question presented or to the relief requested by plaintiffs, the court finds that summary judgment is appropriate. Plaintiffs do not seek an order mandating their marriage. They seek only a determination that the parental consent requirement is unconstitutional so that they may present to the appropriate official the facts relevant to a determination of whether a marriage license should issue. Accordingly, the court now proceeds to consider the merits of plaintiffs' challenge to Section 15.

The Merits

Plaintiffs contend that Section 15 of the New York Domestic Relations Law, [1] requiring parental consent for the marriage of minors between the ages of fourteen and eighteen, deprives them of the liberty which is guaranteed to them by the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. [2]

A review of Supreme Court decisions defining liberties guaranteed by the Fourteenth Amendment reveals that activities relating to child-rearing and education of children, Pierce v. Society of Sisters, 268 U.S. 510 (1925), procreation, Skinner v. Oklahoma, 316 U.S. 535 (1942), abortion, Roe v. Wade, 410 U.S. 113 (1973), family relations, Moore v. City of East Cleveland, 431 U.S. 494 (1977), contraception, Carey v. Population Services International, 431 U.S. 678 (1977), and, most recently, marriage, Zablocki v. Redhail, 434 U.S. 374 (1978), are constitutionally protected rights of individual privacy embodied within the concept of liberty which the Due Process Clause of the Fourteenth Amendment was designed to protect.

However, neither Zablocki nor its predecessors, Loving v. Virginia, 388 U.S. 1 (1967), Griswold v. Connecticut, 381 U.S. 479 (1965), arose in the context of state regulation of marriages of minors. In that respect, this is a case of first impression.

While it is true that a child, because of his minority, is not beyond the protection of the Constitution, In re Gault, 387 U.S. 1 (1967), the Court has recognized the State's power to make adjustments in the constitutional rights of minors. Ginsberg v. New York, 390 U.S. 629 (1968) (criminal statute prohibiting the sale of obscene material to minors whether or not obscene to adults upheld despite First Amendment challenge); Prince v. Massachusetts, 321 U.S. 158 (1944) (child labor law prohibiting minors from selling merchandise on the streets upheld despite Jehovah Witness' challenge based on religious freedom).

"The power of the State to control the conduct of children reaches beyond the scope of authority over adults." Id. at 168. This power to adjust minors' constitutional rights flows from the State's concern with the unique position of minors. In Bellotti v. Baird, 443 U.S. 622 (1979), the Court noted "three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed and mature manner; and the importance of the parental role in child-rearing." Id. at 634.

Likewise, marriage occupies a unique position under the law. It has been the subject of extensive regulation and control, within constitutional limits, in its inception and termination and has "long been regarded as a virtually exclusive province of the State." Sosna v. Iowa, 419 U.S. 393, 404 (1975).

While it is evident that the New York law before this court directly abridges the right of minors to marry, in the absence of parental consent, the question is whether the State interests that support the abridgement can overcome the substantive protection of the Constitution. The unique position of minors and marriage under the law leads this court to conclude that Section 15 should not be subjected to strict scrutiny, the test which the Supreme Court has ruled must be applied whenever a state statute burdens the exercise of a fundamental liberty protected by the Constitution. Applying strict scrutiny would require determination of whether there was a compelling state interest and

whether the statute had been closely tailored to achieve that state interest. See, e.g., Carey v. Population Services International, 431 U.S. 678 (1977). The compelling state purpose necessitated by application of the strict scrutiny test "would cast doubt on a network of restrictions that the States have fashioned to govern marriage and divorce." Zablocki v. Redhail, 434 U.S. at 399 (Powell, J., concurring). It is this court's view that Section 15 should be looked at solely to determine whether there exists a rational relation between the means chosen by the New York legislature and the legitimate state interests advanced by the State. Cf. Ginsberg v. New York, 390 U.S. at 629 (rationality test employed in area of protected freedom). Section 15 clearly meets this test.

The State interests advanced to justify the parental consent requirement of Section 15 include the protection of minors from immature decision-making and preventing unstable marriages. The State possesses paternalistic power to protect and promote the welfare of children who lack the capacity to act in their own best interest. See Addington v. Texas, 441 U.S. 418, 426 (1979). The State interests in mature decision-making and in preventing unstable marriages are legitimate under its parens patriae power.

An age attainment requirement for marriage is established in every American jurisdiction. The requirement of parental consent ensures that at least one mature person will participate in the decision of a minor to marry. That the State

has provided for such consent in Section 15 is rationally related to the State's legitimate interest in light of the fact that minors often lack the "experience, perspective and judgment" necessary to make "important, affirmative choices with potentially serious consequences." Bellotti v. Baird, supra, 443 U.S. at 635-36.

Yet, plaintiffs fault the parental consent requirement of Section 15 as possibly arbitrary, suggesting that courts, as non-interested third parties, are in a better position to judge whether a minor is prepared for the responsibilities that attach to marriage. Although the possibility for parents to act in other than the best interest of their child exists, the law presumes that the parents "possess what the child lacks in maturity" and that "the natural bonds of affection lead parents to act in the best interest of their children." Parham v. J. R., 442 U.S. 584, 610 (1979) (procedure for voluntary commitment of children under eighteen to state hospitals by their parents held constitutional). "That the governmental power should supercede parental authority in all cases because some parents" may act in other than the best interest of their children is "repugnant to the American tradition." Id. at 602-03. See also Wisconsin v. Yoder, 406 U.S. 205 (1972) (state compelled attendance in formal high school to age sixteen unreasonably interferes with interest of Amish parents in providing their children with vocational education under parental guidance); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (state compelled attendance in public school

from age eight to sixteen unreasonably interferes with the interest of parents in directing the rearing of their offspring); Meyer v. Nebraska, 262 U.S. 390 (1923) (statute prohibiting languages other than English from being taught to grade school children unreasonably interferes with the power of parents to control the education of their own children).

Plaintiffs also contend that Section 15 denied them the opportunity to make an individualized showing of maturity and denies them the only means by which they can legitimize their children and live in the traditional family unit sanctioned by law. On the other hand, New York's Section 15 merely delays plaintiffs' access to the institution of marriage. Cf. Sosna v. Iowa, 419 U.S. at 406 (durational residency requirement of one year for divorce proceedings held constitutional). Moreover, the prohibition does not bar minors whose parents consent to their child's marriage. Assuming arguendo that the illegitimacy of plaintiff Moe's child and plaintiff Coe's yet unborn child is a harm, it is not a harm inflicted by Section 15. It is merely an incidental consequence of the lawful exercise of State power. The illegitimacy of plaintiffs' children, like the denial of marriage without parental consent, is a temporary situation at worst. A subsequent marriage of the parents legitimatizes the child, thereby erasing the mark of illegitimacy. Estate of Elson, 94 Misc. 2d 983, 405 N.Y.S.2d 984 (1978). The rights or benefits flowi

from the marriage of minors are only temporarily suspended by Section 15. Any alleged harm to these rights and benefits is not inflicted by Section 15, but is simply an incidental consequence of the valid exercise of State power.

The fact that the State has elected to use a simple criterion, age, to determine probable maturity in the absence of parental consent, instead of requiring proof of maturity on a case by case basis, is reasonable, even if the rule produces seemingly arbitrary results in individual cases. "Simply because the decision of a parent is not agreeable to a child or because there is a [possible stigmatization of the child] does not automatically transfer power to make the decision from parents to some other agency or officer of the state." Parham v. J. R., 442 U.S. at 603.

Plaintiffs' reliance on the abortion and contraception cases is misplaced. See Bellotti v. Baird, 443 U.S. 662 (1979) (state may not impose a blanket prohibition requiring parental or judicial consent as a condition for abortion of an unmarried minor); Carey v. Population Services International, 421 U.S. 678 (1977) (state may not impose a blanket prohibition on right of minors to obtain contraceptives); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (state may not impose a blanket prohibition requiring consent of parent as a condition for abortion of an unmarried minor during the first twelve weeks of pregnancy). These cases can be distinguished from the instant case in that

> a pregnant minor's options are much different than those facing a minor in other situations, such as deciding whether to marry. A minor not permitted to marry before the age of maturity is required simply to postpone her decision. She and her intended spouse may preserve the opportunity for a later marriage should they continue to desire it.

Bellotti v. Baird, supra, 443 U.S. at 642 (emphasis added). Giving birth to an unwanted child involves an irretrievable change in position for a minor as well as for an adult, whereas the temporary denial of the right to marry does not. Plaintiffs are not irretrievably foreclosed from marrying. The gravamen of the complaint, in the instant case, is not total deprivation but only delay.

This court concludes that Section 15's requirement of parental consent is rationally related to the State's legitimate interests in mature decision-making with respect to marriage by minors and preventing unstable marriages. It is also rationally related to the State's legitimate interest in supporting the fundamental privacy right of a parent to act in what the parent perceives to be the best interest of the child free from state court scrutiny. Section 15, therefore, does not offend the constitutional rights of minors but represents a constitutionally

valid exercise of state power.

Accordingly, plaintiffs' motion for summary judgment in their favor is denied and summary judgment is entered in favor of defendants.

Dated: New York, New York
August 17, 1981

Constance Baker Motley
CONSTANCE BAKER MOTLEY
U. S. D. J.

FOOTNOTES

1. The pertinent parts of Section 15 are as follows:

> (2) If it shall appear upon an application of the applicant as provided in this section or upon information required by the clerk that the man is under eighteen years of age and is not under sixteen years of age, or that the woman is under the age of eighteen and not under fourteen years of age, then the town or city clerk before he shall issue a license shall require the written consent to the marriage from both parents of the minor or minors or such as shall then be living, or if the parents of both are dead, then the written consent of the guardians of such minor or minors. If one of the parents has been missing and has not been seen or heard from for a period of one year preceding the time of the application for the license, although diligent inquiry has been made to learn the whereabouts of such parent, the town or city clerk may issue a license to such minor upon the sworn statement and consent of the other parent. If the marriage of the parents of such a minor has been dissolved by decree of divorce or annulment, the consent of the parent to whom the court which granted the decree has awarded custody of such minor shall be sufficient. If there is no parent or guardian of the minor or minors living to their knowledge then the town or city clerk shall require the written consent for the marriage of the person under whose care and government the minor or minors may be before a license shall be issued. If a parent of such minor has been adjudicated an incompetent, the town or city clerk may issue a license to such minor upon the production of a certified copy of such judgment so determining and upon the written consent of the other parent.

N.Y. Dom. Rel. Law § 15 (14 McKinney).

FOOTNOTES, cont'd

2. There is no legislative history on Section 15 as amended in 1907 to include the licensing and parental consent requirement. New York State's Governor's Bill Jackets from 1906 to 1921 were destroyed in a fire. There is nothing in the New York Senate or Assembly Journals or Documents regarding the parental consent requirement. The New York Times mentions, albeit briefly, that Senator Wood, the sponsor of the bill, stated that "[t]his bill will correct many evils. I think that ther would be fewer runaway couples," New York Times, June 5, 1907, at 2, col. 2, and "enforcement of the law will prevent runaway marriages while the contracting parties are immature." New York Times, December 31, 1907, at 6, col. 3.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MARIA MOE, RAOUL ROE, and RICARDO ROE, an infant, by his father RAOUL ROE, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

-against-

80 CIV. 1577 (CBM)

DAVID DINKINS, individually, and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State, and DAVID AXELROD, individually, and as New York State Commissioner of Health,

Defendants.

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CONSTANCE BAKER MOTLEY, D. J.

MEMORANDUM OPINION

Plaintiffs Maria Moe, Raoul Roe and Ricardo Roe filed this class action on March 19, 1980, pursuant to 42 U.S.C. § 1983, for a judgment declaring unconstitutional, and enjoining the enforcement of, the parental consent requirements of New York Domestic Relations Law §§ 15.2 and 15.3 (section 15). New York law forbids marriage without a license. New York Dom. Rel. Law § 13. Section 15 provides that all male applicants for a marriage license between ages 16 and 18 and female applicants between ages 14 and 18 must obtain "written consent to the marriage from both parents of the minor or minors or such as shall then be living. . . ."

Plaintiffs claim that the challenged statute burdens the right to marry of minors and their prospective spouses and prevents them from establishing legitimate parent-child relationships through marriage, in violation of their rights under the first, fifth, ninth and fourteenth amendments to the United States Constitution.

Plaintiff Raoul Roe was eighteen years old when this action was commenced. Plaintiff Maria Moe was fifteen years old. Plaintiff Ricardo Roe is their twenty-one month old son who was born out of wedlock. Plaintiffs live together as an independent family unit. In late November, 1978, Maria became pregnant by Raoul and in April, 1979, they moved into an apartment together. Maria requested consent from her mother, a widow, to marry Raoul, but Mrs. Moe refused, allegedly because she wishes to continue receiving welfare benefits for Maria. Maria and Raoul continue to be prevented from marrying because of Mrs. Moe's failure to give consent to the marriage as required by section 15. Maria and Raoul allege that they wish to marry in order to cement their family unit and to remove the stigma of illegitimacy from their son, Ricardo.

On July 10, 1980, this court dismissed the complaint on grounds of abstention. The Court of Appeals for the Second Circuit reversed the order of dismissal on December 9, 1980, and remanded the case for further proceedings consistent with its opinion. Moe v. Dinkins, 635 F.2d 1045 (2d Cir. 1980). On March 27, 1981, this court heard defendants' motions to dismiss

the complaint on the grounds that the claims are not ripe for adjudication and that the complaint is not justiciable as to defendant Axelrod, New York State Commissioner of Health. The court also heard plaintiffs' motion for an order certifying a plaintiff and a defendant class. The court denied defendants' motions to dismiss the complaint and granted plaintiffs' motion for class certification. The court now modifies its order to deny plaintiffs' motion for certification of the second plaintiff subclass consisting of persons born or about to be born to parents who cannot marry because they lack the necessary parental consent pursuant to section 15 to obtain a marriage license. The reasons for the court's decisions are discussed below.

At the close of oral argument on March 27, 1981, the court directed the parties to submit memoranda of law regarding whether notice to the class members is required or appropriate in this action. Upon consideration of these memoranda, the court has determined that notice is not required or appropriate. The reasons for this decision are also discussed below.

Ripeness

Defendants argue that plaintiffs' action should be dismissed on the ground that plaintiffs' claims are not ripe for constitutional adjudication because plaintiffs have not alleged that they applied for and were denied a marriage license. Defendants rely for this contention on cases in which federal courts found complaints not to be ripe because there was no

certainty that the application in question would be denied if presented. See Mendez v. Heller, 530 F.2d 457 (2d Cir. 1976); Rhodes v. Laurino, 601 F.2d 1239 (2d Cir. 1979). Defendants contend that it is essential for plaintiffs in this action to apply for a marriage license because it is possible that the City Clerk will issue a license to plaintiffs.

Defendants' argument must be rejected in light of the Court of Appeals' opinion in Moe v. Dinkins, 635 F.2d 1045 (2d Cir. 1980). In that decision, the court held that the abstention doctrine which authorizes federal courts to refrain from interpreting state law where ambiguities in that law might enable a plaintiff to prevail in the courts of the state did not apply in this case. The court dismissed each of the alternative constructions of section 15 posed by defendants which might permit Maria and Raoul to marry, finding that the statute as written creates a total bar to Maria's marriage so long as her mother demurs. "The crystalline parlance of section 15 has remained unchanged since its enactment over seventy years ago. . . . We hold. . .that the remote and implausible suggestions of ambiguity surrounding the statute before us do not justify abstention." Id. at 1050.

The situation confronting the plaintiffs in this action is similar to that in Image Carrier Corp. v. Beame, 567 F.2d 1197 (2d Cir. 1977), cert. denied, Image Carrier Corp. v. Koch, 440 U.S. 979 (1979). In that case, the Court of Appeals

held that a challenge by nonunion printers of a resolution permitting only union printers to bid for New York City's flat-form printing work was ripe for constitutional adjudication although the nonunion printers did not bid for the work and were not turned down. The court reasoned that after 43 years of implementation of the resolution the City's position was amply developed, and that requiring a nonunion shop to undergo the expense of preparing a bid with the certainty that it would be rejected imposed unnecessary financial hardship, without framing the issues more sharply. Id. at 1202.

As in Image Carrier Corp. v. Beame, supra, it is not necessary in this action to require Maria Moe and Raoul Roe to go through the time, expense and inconvenience of presenting an application for a marriage license which will certainly be denied. The parental consent requirement of section 15 has a long history of implementation and the constitutional questions it poses are already sharply framed. Since the issues in this action are ripe for constitutional adjudication, defendants' motion to dismiss must be denied.

Justiciability as to Defendant Axelrod

Defendant Axelrod, the New York State Commissioner of Health, contends that plaintiffs' claims are not justiciable as to him because there is no direct connection between him and the enforcement of the statute which plaintiffs challenge. Axelrod claims that his supervisory role over local clerks, under New

York Dom. Rel. Law §§ 19-23, extends only to record keeping and not to the issuance of marriage licenses.

A state official may properly be made a party to a suit seeking to enjoin the enforcement of an allegedly unconstitutional statute if that official plays some role in the enforcement of the statute. Donohue v. Board of Elections of the State of New York, 435 F. Supp. 957, 963 (E.D.N.Y. 1976). An examination of Axelrod's duties as New York State Commissioner of Health set forth in the New York Domestic Relations Law reveals that there is sufficient nexus with the enforcement scheme of the Domestic Relations Law to make Axelrod a proper party defendant in this law suit. New York Dom. Rel. Law § 23 provides in pertinent part:

> When [the commissioner] shall deem it necessary, he shall report cases of violation of any of the provisions of this article [Article 3 - Solemnization, Proof and Effect of Marriage] to the district attorney of the county, with a statement of the facts and circumstances; and when any such case is reported to him by the state commissioner of health, the prosecuting attorney shall forthwith initiate and promptly follow up the necessary court proceedings against the person or persons

responsible for the alleged violation of law. Upon request of the state commissioner of health, the attorney-general shall assist in the enforcement of the provisions of this article.

Axelrod's statutory duty to ensure that violators of section 15 are prosecuted is adequate ground for finding that plaintiffs' action challenging the constitutionality of that statute is justiciable as to him. See Donohue v. Board of Elections of the State of New York, supra, 435 F. Supp. at 963; Socialist Workers Party v. Rockefeller, 314 F. Supp. 984, 988 n.7 (S.D.N.Y.) (three-judge court), aff'd, 400 U.S. 806 (1970).

Class Certification

Plaintiffs moved for certification of both a plaintiff class and a defendant class pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. The plaintiff class is composed of two subclasses defined as:

1) persons who wish to marry in New York State but cannot obtain a marriage license or judicial approval to obtain a marriage license because they, or the persons whom they seek to marry, lack parental consent as required by [section 15]; and

2) persons born or about to be born to parents who cannot marry because they lack the necessary parental consent pursuant to [section 15] to obtain a marriage license.

The first subclass is represented by Maria Moe and Raoul Roe; the second subclass is represented by Ricardo Roe.

The defendant class is defined as:

all town and city clerks in New York State. All such clerks are required by New York State law to enforce the parental consent provisions of [section 15].

The defendant class is represented by David Dinkins, City Clerk of New York City.

Rule 23(a) provides that an action may be maintained as a class action if the following requirements are satisfied: 1) the class is so numerous that joinder of all members is impracticable; 2) there are questions of law or fact common to the class; 3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and 4) the representative parties will fairly and adequately protect the interests of the class. Plaintiffs seek to maintain this action under Rule 23(b)(2), which requires, in addition to the four prerequisites cited above, that the party opposing the class has acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding

declaratory relief with respect to the class as a whole. The court finds that the first plaintiff subclass and the defendant class meet all four prerequisites of Rule 23(a) and that this action is maintainable as a class action under Rule 23(b)(2).

There is no practical method for identifying the members of the first plaintiff subclass and no statistics exist which would allow computation of its exact number. However, the fact that the exact number of the class cannot be determined does not bar a finding that the numerosity requirement of Rule 23(a)(1) is satisfied. Siegel v. Realty Equities Corp. of New York, 54 F.R.D. 420, 424 (S.D.N.Y. 1972).

A court may draw reasonable inferences about the size of the class from the facts before it, particularly when injunctive and declaratory relief is sought against a statute or regulation of general application. Wescott v. Califano, 460 F. Supp. 737, 744 (D. Mass 1978), aff'd, 443 U.S. 76 (1979); Doe v. Flowers, 364 F. Supp. 953, 954 (N.D.W.Va. 1973) (per curiam), aff'd mem., 416 U.S. 922 (1974).

In Wescott v. Califano, supra, plaintiffs sought to certify a class of Massachusetts families who were not eligible for Aid to Families with Dependent Children because of alleged sex discrimination in a federal statute and state regulations which granted eligibility to families with unemployed fathers, but not unemployed mothers. The court noted that the Massachusetts Department of Public Welfare did not compile information

concerning the mother's employment history for two parent families denied benefits on the ground that the father did not meet the definition of unemployed and that there was therefore no direct evidence of the size of the class. The court concluded, however, that it could infer from the labor force participation of Massachusetts married women with children, along with recent unemployment statistics, that numerous class members existed. Id. at 744. The court also noted that plaintiffs' inability to identify class members, moreover, buttressed their contention that joinder was impracticable. Id. at 745, citing, Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638, 645 (4th Cir. 1975).

In light of these authorities, the court finds that plaintiffs have demonstrated that their class is so numerous that joinder is impracticable. Defendants do not dispute plaintiffs' representation that in New York City alone there were over 32,000 pregnancies and over 10,000 out-of-wedlock births to women between fifteen and nineteen in 1978 and that in 1979 there were nationwide 26,000 unmarried males and 12,000 unmarried females between the ages of 14 and 19 who were the primary income earners in a household which they shared with one person of the opposite sex.[1/] It is reasonable to infer from these two bodies of statistics that the number of plaintiff class members is sufficiently large to make joinder impracticable.

The basic legal question in this lawsuit is the constitutionality of the parental consent requirement of section 15.

The inability to obtain a marriage license because of the lack of parental consent is the source of the constitutional challenge of all members of the plaintiff class. Thus, there are questions of law and fact which are common to the class, as required by Rule 23(a)(2).

The typicality requirement of Rule 23(a)(3) is satisfied if:

> ...the claims of the representatives and of the members of the putative class arise from the same transaction or legal theory...or if there is an absence of antagonism or conflicting interest between the representatives and absent class members.

Jennings Oil Co., Inc. v. Mobil Oil Corp., 80 F.R.D. 124, 128 (S.D.N.Y. 1978) (citations omitted). This test is met by the representatives and members of both plaintiff subclasses. The claim of the entire class is that the inability to obtain a marriage license because of the absence of parental consent is unconstitutional. The representatives and all class members share the common goal of removing the obstacle of section 15's parental consent requirement and all will benefit if the challenged statute is declared unconstitutional.

Defendants contend that the claims of the representative plaintiffs are not typical because the particular situat: of Maria, Raoul and Ricardo differs from that of other member: the class. Defendants note that in many cases the refusal of

consent is justified as being in the minor's best interests or as representing legitimate state interests. Because the reasons of parents for denying consent vary, defendants argue, individual facts predominate over the common question of law. Defendants also argue that Maria, a sixteen year old, is not suited to represent a class that includes fourteen, fifteen and seventeen year olds, since the maturity level is different at each age.

Defendants' argument demonstrates a misunderstanding the typicality requirement. The representative plaintiffs' claims may be viewed as typical even if they are not identical with the claims of each member of the class. Plaintiffs have satisfied the typicality requirement because their claims are grounded in a common constitutional challenge to a statute of general application. Factual variation among class members d not destroy typicality. Leisner v. New York Telephone Co., 3 F. Supp. 359, 372 (S.D.N.Y. 1973); Mendoza v. Lavine, 72 F.R. 520, 523 (S.D.N.Y. 1976).

Defendant Dinkins' reliance on O'Connell v. Teacher College, 63 F.R.D. 638 (S.D.N.Y. 1973), a suit alleging sex discrimination in the hiring and promotion practices of a co is misplaced. In that case the court declined to certify a composed of female employees and applicants, holding that th issues of fact common to the alleged class members would not predominate over individual issues because a determination o the merits of the claim of each class member would necessita

detailed inquiry into her individual qualifications. Id. at 639 It is clear that the court's reasoning did not pertain to the typicality requirement, but rather to why plaintiffs had not met the requirement of Rule 23(b)(3) that questions of law or fact common to the members of the class predominate over any question affecting only individual class members. Plaintiffs in the instant action seek to maintain the class under Rule 23(b)(2) and not Rule 23(b)(3).

Finally, the court finds that the representative plaintiffs will fairly and adequately protect the interests of the class pursuant to Rule 23(a)(4) since plaintiffs' attorney is a qualified and experienced member of the bar and since the representative plaintiffs' interests are coextensive with those of al class members.

The court finds, however, that it would be inappropriate to certify the second plaintiff subclass. The general outlines of the membership of the class must be determinable at the outset of the litigation. Rappaport v. Katz, 62 F.R.D. 512, 513 (S.D.N.Y. 1974). A class which includes persons "about to be born" is too amorphous and imprecise to meet this standard. Moreover, it is unnecessary to certify this subclass since the court has granted plaintiffs' motion to certify the first plaintiff subclass. The objective of the second plaintiff subclass is to remove the obstacle of the parental veto from their parent marriage so that they will become legitimate children. If the members of the first plaintiff subclass are granted the injuncti

and declaratory relief they seek, the members of the second subclass, their children, will automatically be benefitted. The court, therefore, denies plaintiffs' motion to certify the second plaintiff subclass.

The court also finds that the defendant class satisfies all four prerequisites of Rule 23(a). Defendant class, composed of hundreds of city and town clerks dispersed throughout the state, is clearly of sufficient size to meet the numerosity requirement of Rule 23(a)(1). The question of the constitutional validity of the parental consent requirement of section 15 is common to all members of the defendant class. The shared defense — that the statute is constitutional — satisfies the requirement that the claims of the representative are typical of the class. New York City's clerk, David Dinkins, represented by Corporation Counsel of the City of New York, will afford adequate and fair representation to the class.

In addition, plaintiffs have demonstrated that both plaintiff and defendant classes fall under Rule 23(b)(2) which allows an action to be maintained as a class action if the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or declaratory relief with respect to the class as a whole. Where, as here, a statute with statewide application is challenged on the ground of its facial unconstitutionality, allowing the action to proceed on behalf of the class of those whose rights are allegedly infringed against the class of

officials charged with the statute's enforcement serves the interests of judicial administration and justice which Rule 23 was designed to further. Redhail v. Zablocki, 418 F. Supp. 1061, 1066 (E.D. Wis. 1976), aff'd, 434 U.S. 374 (1978). See also Advisory Committee's Note to 1966 Amendment, 39 F.R.D. 102 (1966).

Defendants argue that class certification is unnecessary since declaratory and injunctive relief would bind all clerks in New York State and would assure that all plaintiff class members would be benefitted. Defendants rely principally upon Galvan v. Levine, 490 F.2d 1255 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974). In Galvan v. Levine, the Court of Appeals affirmed the district court's denial of plaintiffs' motion for class certification pursuant to Rule 23(b)(2) because defendant, the Industrial Commissioner of the State of New York, had made it clear that he understood the judgments to bind him with respect to all claimants. The Court noted that, even before entry of the judgment, the Commissioner had withdrawn the challenged policy even more fully than the court ultimately directed and stated he did not intend to reinstate the policy. Id. at 1261. There was therefore no need to certify the class since the primary objective of plaintiffs in seeking class certification, that of ensuring that the judgment run to the benefit not only of the named plaintiffs but of all others similarly situated, had already been accomplished.

The instant action is distinguishable from Galvan v. Levine. In this case defendants have made no substantial assurances that they will respect an adverse determination and consider themselves bound by it with regard to the general application of section 15. In fact, defendants have steadfastly defended the constitutionality of section 15 and indicated that they would do no more than apply the general concept of stare decisis to the determination of this court. The holding in Galvan v. Levine, therefore, is not a bar to class certification in this action pursuant to Rule 23(b)(2). See Percy v. Brennan, 384 F. Supp. 800, 811 (S.D.N.Y. 1974); Cicero v. Olgiati, 410 F. Supp. 1080, 1099 n.8 (S.D.N.Y. 1976).[2/]

Notification

Plaintiffs and defendant Axelrod agree that prejudgment notice to class members is not required in this action. Notice is required by Rule 23(c)(2) only in class actions certified under Rule 23(b)(3). The Supreme Court stated in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 n.14 (1974), that "[b]y its terms subdivision (c)(2) is inapplicable to class actions for injunctive or declarative relief maintained under subdivision (b)(2)." The Court of Appeals for this Circuit has also noted that prejudgment notice is not required in class actions maintained under Rule 23(b)(2). Ives v. W.T. Grant Company, 522 F.2d 749, 764 (2d Cir. 1975); Frost v. Weinberger, 515 F.2d 57, 65 (2d Cir. 1975), cert. denied, Frost v. Mathews, 424 U.S. 958 (1976). It i

clear therefore that this court is not required by Rule 23 to order that the class members be notified of the pendency of this action.

Rule 23(d)(2) provides that the court may, in its discretion, make appropriate orders

> requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of. . .the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;
>
> . . .

Plaintiffs and defendant Axelrod contend that none of the considerations that would warrant the court's exercise of its discretion to direct notice, pursuant to Rule 23(d)(2), is present in this case. Nor do considerations of the due process, they argue, require prejudgment notice. The court agrees.

Due process permits binding absentees to a judgment with respect to common questions of law if they have been adequately represented in the suit. Hansberry v. Lee, 311 U.S. 32 (1940). In the class action context, notice is simply a means of assuring this adequacy and is not required where adequate representation is otherwise guaranteed. Marcera v. Chinlund,

595 F.2d 1231, 1240 n.13 (2d Cir.), cert. granted and vacated and remanded on different grounds, 442 U.S. 915 (1979). Defendant class members are adequately represented by David Dinkins, City Clerk for New York City, since his interest in the subject matter of the suit is identical to the interest of the other class members. These interests are further protected by the chief legal officers of the State and City of New York. Defendant class consists of one homogeneous group and the case presents only one legal issue which is common to all defendant class members, i.e., the constitutionality of section 15. There is therefore no need for other class members to be notified in order that they may intervene in the action. See Redhail v. Zablocki, supra, 418 F. Supp. at 1067-1068.

The same considerations support the conclusion that prejudgment notice to plaintiff class members is not necessary. The representative plaintiffs and the class members share the common goal of abolishing the parental veto from section 15 so that they may fully exercise their constitutional rights. Counsel for the named plaintiffs, an experienced member of the bar, will adequately protect the interests of the entire class. Moreover, where the (b)(2) class includes a large number of persons whose identities and whereabouts are unknown, notification may well be impossible. Redhail v. Zablocki, supra, 418 F. Supp. at 1067.

Accordingly, the court holds that the parties are not required to give prejudgment notice of this action to defendant and plaintiff class members.

Dated: New York, New York
June 29, 1981

Constance Baker Motley
CONSTANCE BAKER MOTLEY
U. S. D. J.

FOOTNOTES

1. Plaintiffs cite HUMAN RESOURCES ADMINISTRATION, REPORT OF THE HRA AD HOC INTERAGENCY TASK FORCE ON ADOLESCENT PREGNANCY (December 1979) and U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, "Marital Status and Living Arrangements", Series P-20, No. 349 (March 1979), respectively, for these figures.

2. The court in Cicero v. Olgiati, supra, a suit by prisoners in New York State correctional facilities challenging the validity of the New York statute which specified the basis for parole release, granted class certification pursuant to Rule 23(b)(2). The court held that Galvan v. Levine was inapposite since defendant had not made the requisite showing. The court also held that, in any event, "considerations of judicial economy justify class treatment here to avoid the likelihood of mootness before a final resolution of the merits. . . .It would be a waste of judicial resources and litigants' expenses to pursue significant constitutional issues if their ultimate resolution might be aborted solely by a change in status of the named plaintiffs." Id. The same considerations of judicial economy make class treatment appropriate in the instant action since the claims of the named plaintiffs would become moot if Maria turns eighteen before the final resolution of the merits.

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. 384 U.S. at 570–71, 86 S.Ct. at 1708. Our review of the above authorities persuades us that the effect of Capper-Volstead is to prevent the full application of the second element of this test to agricultural cooperatives. Capper-Volstead permits the formation of such cooperatives and places no limitation on their size. As the cooperative grows, so, normally, does its power over the market. Thus, while the formation, growth and operation of a powerful cooperative is obviously a "willful acquisition or maintenance of such power," and will rarely result from "a superior product, business acumen, or historic accident," *id.*, it is exactly what Capper-Volstead permits.

We conclude that *Grinnell* does not apply to monopoly power that results from such acts as the formation, growth and combination of agricultural cooperatives, but applies only to the acquisition of such power by other, predatory means. It is not a violation of the Sherman Act for the members of an agricultural cooperative to carry out the legitimate objectives of their association which follow naturally from their attempts to achieve unity of effort and the voluntary elimination of competition among themselves. *Maryland and Virginia Milk Producers Association v. United States*, *supra*, 362 U.S. at 465, 80 S.Ct. at 852. *See Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 635, 95 S.Ct. 1830, 1841, 44 L.Ed.2d 418 (1975).

That part of the district court's order which granted defendants summary judgment on plaintiff's claim of a section 1 Sherman Act violation is affirmed. Because it is not clear whether the district court denied defendants' motion for summary judgment dismissing the section 2 count on the premise that the mere accretion of power from formation of a cooperative is sufficient to violate that section or on the ground that predatory acts had been sufficiently shown, that part of the order is vacated, and the matter is remanded to the district court for reconsideration consistent with the principles set forth in this opinion. We express no opinion concerning the district court's ultimate resolution of this portion of defendants' summary judgment application.[1]

Maria MOE, Raoul Roe, and Ricardo Roe, an infant by his father, Raoul Roe, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants,

v.

David DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State, and David Axelrod, individually, and as New York State Commissioner of Health, Defendants-Appellees.

No. 454, Docket 80-7676.

United States Court of Appeals, Second Circuit.

Submitted Nov. 25, 1980.

Decided Dec. 9, 1980.

Appeal was taken from an order of the United States District Court for the South-

1. There are those who contend that the economics of farming have changed so drastically in recent years through farm growth and mechanization that the Capper-Volstead Act is no longer needed to equalize bargaining power. *See* Tenkmir, *supra* note 5, at 334; Note, *Trust Busting Down on the Farm: Narrowing the Scope of Antitrust Exemptions for Agricultural Cooperatives*, 61 Va.L.Rev. 341, 381–89 (1975). It is for Congress, not the courts, to determine whether there is sufficient merit in this argument to warrant a redesign of the statute.

ern District of New York, Constance Baker Motley, J., which dismissed complaint challenging constitutionality of a New York statute prohibiting marriage by a woman under age of 18 years without parental permission on grounds of abstention. The Court of Appeals, Irving R. Kaufman, Circuit Judge, held that New York's remote and implausible suggestions of ambiguity in statute forbidding marriage by a woman under age of 18 years without parental permission did not justify district court's abstention from determining constitutionality of that statute, particularly in light of fact that the mother and her intended husband had cohabited out of wedlock for a year and a half and had a child who had lived as an illegitimate child for over a year.

Reversed and remanded.

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1. Federal Courts ⇐43

When asked to void a state law on constitutional grounds, federal court will stay its hand if state statute is susceptible of two or more constructions, and if one of the interpretations will either save the statute or modify the constitutional issue.

2. Federal Courts ⇐47

New York's remote and implausible suggestions of ambiguity in statute forbidding marriage by a woman under age of 18 years without parental permission did not justify district court's abstention from determining constitutionality of that statute, particularly in light of fact that the mother and her intended husband had cohabited out of wedlock for a year and a half and had a child who had lived as an illegitimate child for over a year. N.Y. Domestic Relations Law § 15.

3. Parent and Child ⇐16

New York minors are emancipated by agreement of parent and child, or by unilateral action of the parent; emancipation is not within sole power of the child.

* Of the United States District Court for the Southern District of New York, sitting by designation.

Janet M. Calvo, New York City (Washington Square Legal Services, Inc., of counsel), for plaintiffs-appellants.

Robert Abrams, Atty. Gen. of the State of New York, New York City (Robert J. Schack, Asst. Atty. Gen., George D. Zuckerman, Asst. Sol. Gen., New York City, of counsel), for defendant-appellee Axelrod.

Allen G. Schwartz, Corp. Counsel of the City of New York, New York City (June A. Witterschein, New York City, of counsel), for defendant-appellee Dinkins.

Before KAUFMAN and TIMBERS, Circuit Judges, and PIERCE, District Judge.*

IRVING R. KAUFMAN, Circuit Judge:

Federal adjudication of constitutional challenges to state statutes is an arduous task, for the delicate balance between federal and state power must be crafted with a sensitivity responsive to their respective authorities. The Constitution and Congress equip federal courts with authority to void state laws that transgress federal civil rights, but comity toward state sovereignty counsels the power be sparingly used. Accordingly, the doctrine of abstention authorizes our federal courts to refrain from interpreting state law where ambiguities in that law might enable a plaintiff to prevail in the courts of the state. Abstention, however, creates a lapse in the federal protection of civil rights. Accordingly, we are instructed to utilize the doctrine with strict circumspection. Plaintiffs in this case sue to vindicate what they contend to be at the heart of our constitutional liberties, the right to marry and to raise a family without unreasonable social and legal stigma. Their chances of success under state law alone are attenuated at best. The harm they allege is immediate. Abstention is therefore improper, and we reverse the district court's order dismissing the complaint and remand for further proceedings.

I.

A brief review of the facts is instructive. Raoul Roe[1] was born on March 9, 1962, and Maria Moe was born on March 2, 1963. In late November 1978, Maria became pregnant by Raoul. He was sixteen; she was thirteen. Maria's mother, who is a widow, urged Maria to have an abortion; Maria refused. In April 1979, Maria and Raoul moved into an apartment together, and decided to marry. Raoul's parents gave their permission, but Maria's mother refused. On August 21, 1979, Maria bore a son, Ricardo Roe.

Maria, Raoul, and Ricardo filed suit on March 19, 1980, in the federal district court under 42 U.S.C. § 1983 (1976). Their complaint alleged that the New York statute controlling the marriage of minors, New York Domestic Relations Law § 15, unconstitutionally burdened Maria's and Raoul's right to marry.[2] New York law forbids marriage without a license,[3] and section 15 provides in part:

> If it shall appear ... that the woman is under the age of eighteen years and is not under fourteen years of age then the town or city clerk before he shall issue a license shall require the written consent to the marriage from both parents of the minor ... or such as shall then be living ....[4]

Beyond the denial of Maria's and Raoul's right to marry, plaintiffs alleged, the New York statute deprived Maria of workmen's compensation benefits, Social Security benefits, and intestate succession rights she might enjoy as Raoul's wife.[5] Further, they claimed that section 15 inflicted all of the social and economic disabilities of illegitimacy on Ricardo. Therefore, time was of the essence in the prosecution of their suit.

Defendants moved to dismiss, contending that the federal court should abstain from adjudication. Judge Motley, in a careful opinion, found section 15 "unclear in a number of respects," and dismissed the action.[6] This appeal followed.

II.

[1, 2] The legal standard for federal judicial abstention has been considered on numerous occasions, and the law is clear. When asked to void a state law on constitutional grounds, a federal court will stay its hand if the state statute is susceptible of two or more constructions, and if one of the interpretations will either save the statute

1. By district court order, the plaintiffs have been permitted to proceed under pseudonyms.

2. Plaintiffs alleged that marriage is a "fundamental right," *Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), and that such fundamental rights are not restricted to adults, *see Carey v. Population Services Int'l*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) (making family planning services available to minors). Therefore, plaintiffs contend, § 15's prohibition of their marriage is unconstitutional. In light of our decision, we express no view on the merits, nor on plaintiffs' motion for class certification.

3. *See* New York Dom.Rel.Law § 13 (McKinney 1977). Named as defendants were David Dinkins, City Clerk of New York, and David Axelrod, New York State Commissioner of Health. They administer the granting of marriage licenses.

4. Females *under* fourteen may not marry. New York Dom.Rel.Law § 15-a (McKinney 1977). Females fourteen or fifteen need both parental and judicial consent to marry. *Id.* at § 15, subd. 3. Since Maria never secured parental consent, § 15's judicial consent provision is not relevant here.

Section 15 also requires parental consent for males under eighteen who wish to marry. Raoul had secured such permission. In any event, he was eighteen when the complaint was filed. The district court dealt only with the parental consent requirement relating to Maria.

5. If Maria were Raoul's wife, she might be eligible for Workmen's Compensation benefits under New York Work.Comp.Law § 15 (McKinney 1965 & Supp.1979–1980), Social Security benefits under 42 U.S.C. § 402 (1976), and intestate succession rights under New York Est., Powers & Trusts Law § 4-1.1 (McKinney 1967).

6. The dismissal was without prejudice so that plaintiffs could pursue their constitutional claims, if necessary, in federal court after completion of state court proceedings. *See generally England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 425, 84 S.Ct. 461, 470, 11 L.Ed.2d 440 (1964).

or modify the constitutional issue. *See Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); *Pharmaceutical Society, Inc. v. Lefkowitz*, 586 F.2d 953, 956 (2d Cir. 1978); *Winters v. Lavine*, 574 F.2d 46, 69 (2d Cir. 1978); *McRedmond v. Wilson*, 533 F.2d 757, 760 (2d Cir. 1976).[7] Should the federal court abstain and the state tribunal elect the saving construction, dividends of comity redound. But should the state suit produce an interpretation in which constitutional infirmities persist, the plaintiff is forced, usually years later,[8] to return to the federal court.

Crucial to the abstention decision, therefore, is the ambiguity of the state statute. A clearly-worded law leaves even the most constitutionally-sensitive state court little room to maneuver its way to a saving construction. Remand under such circumstances serves no purpose of comity; it wastes the plaintiff's, the defendant's, and the state court's time, and causes unseemly delay in the federal court adjudication.

The statute before us is clear. No ambiguous words or phrases exist; the parties concur on the import and application of "consent," "parents," and every other material term. They also agree that the statute as written creates a total bar to Maria's marriage so long as her mother demurs. To evade the constitutional analysis that seems to us so clearly mandated, the state poses three alternative constructions of section 15 which might permit Maria and Raoul to marry. The suggestions are quite strained, and none of the three is sufficiently tenable to merit abstention.

First, the state argues New York courts might impute a requirement of "reasonableness" into the parents' decision to give or withhold consent. Such a standard is, of course, not in the statute, and New York courts have never departed from a literal interpretation of section 15. In *In re Peters*, 96 Misc.2d 183, 408 N.Y.S.2d 761 (Fam. Ct.1978), a widowed mother refused to consent to the marriage of her seventeen-year-old son, and the son sued to secure approval. The Family Court held itself without subject matter jurisdiction, "even were [consent] shown to be unreasonably withheld or refused . . . ." In *Berger v. Adornato*, 76 Misc.2d 122, 350 N.Y.S.2d 520 (Sup.Ct.1973), an under-age male whose parents would not consent challenged the constitutionality of an earlier version of the statute's creation

7. Abstention was initially characterized as an equitable concept, since it is invoked in actions seeking an injunction against the enforcement of a state statute or a declaration that a statute is void. *See Railroad Commission v. Pullman Co.*, 312 U.S. 496, 500, 61 S.Ct. 643, 645, 85 L.Ed. 971 (1941). Although abstention's origins in equity might suggest that decisions to abstain are reversible only if an abuse of discretion, appellate courts from *Pullman* to the present have used a more searching standard of review, and have reversed abstention orders whenever convinced the decision was improper or wrong. 1A *Moore's Federal Practice* ¶ 0.203[1] at 2105–06 (2d ed. 1980). ("[E]lements of the *Pullman* abstention doctrine [are applied] in essentially the same way as a statute is applied"). *See, e. g., Naylor v. Case and McGrath, Inc.*, 585 F.2d 557 (2d Cir. 1978); *McRedmond v. Wilson*, 533 F.2d 757 (2d Cir. 1976); *Freda v. Lavine*, 494 F.2d 107 (2d Cir. 1974). More vigorous review is required because the sensitive federalism concerns served by abstention merit careful appellate scrutiny. Moreover, the factors on which the decision to abstain depends—ambiguity of state law, materiality of the state issue, *see McRedmond v. Wilson*, *supra*—do not fall within any special expertise of a district court. Finally, while abstention first appeared in cases involving injunctions, abstention *sui generis* is not equitable. Since *Pullman*, abstention has been sanctioned in cases wholly at law. *E. g., Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 28, 79 S.Ct. 1070, 1072, 3 L.Ed.2d 1058 (1959). We consider our review to approach that of a plenary examination given to questions of law.

8. The abstention doctrine is one of the dark chapters in the history of judicial dispatch. *See, e. g., England v. Louisiana State Board of Medical Examiners*, 384 U.S. 885, 86 S.Ct. 1824, 16 L.Ed.2d 996 (1966) (per curiam) (three suits, nine years); *Silverman v. Browning*, 434 F.Supp. 80 (D.Conn.) (three-judge district court), *aff'd*, 429 U.S. 876, 97 S.Ct. 226, 50 L.Ed.2d 162 (1976) (five years). *See also* Clark, *Federal Procedural Reform and Sisters' Rights to a More Perfect Union*, 40 Tex.L.Rev. 311, 321 (1961) (citing eight- and ten-year delays). *See generally England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 425, 84 S.Ct. 461, 470, 11 L.Ed.2d 440 (1964) (Douglas, J., concurring) ("*Pullman* from the start seemed to have some qualities of a legal research lunacy.").

of different age limits for males and females. The court did not embrace the opportunity to impute "reasonableness" into the parental consent requirement and allow the plaintiff to marry on that ground; instead, it declared the age differential totally unconstitutional. Moreover, where one parent is insane, and therefore presumably unable to give reasoned consent, the permission of that parent is still required. 1964 Op.Atty.Gen. 138. And, the consent of a court-appointed guardian cannot bypass the statutory requirement of parental consent, regardless of the unfairness created by a refusal to grant permission. 1973 Op. Atty.Gen. 144–45.

Second, the state argues that New York courts could read into section 15 a "best interests of the child" standard. This technique, however, has been employed less frequently than the state maintains, and then only in child custody cases. *See, e. g., In re Wesley L. III*, 72 A.D.2d 137, 423 N.Y.S.2d 482 (1st Dep't 1980). In those instances, the governing statute, New York Social Services Law § 384–b, subd. 1 (McKinney Supp. 1979–1980), contains an explicit direction that "the best interests ... of the child" shall be considered. New York courts have curtailed the application of this standard even in the child custody context. *See In re Sanjivini K.*, 47 N.Y.2d 374, 391 N.E.2d 1316, 418 N.Y.S.2d 339 (1979). Moreover, they have never imputed this language into a statute where the language was not included by the legislature that passed it.

[3] Finally, the state suggests New York courts might read section 15 to exempt "emancipated minors" from the parental consent requirement. Here too, courts have shown no tendency to stray from the words of the statute toward such an interpretation. In *Berger v. Adornato*, *supra*, 350 N.Y.S.2d at 523, the court found the plaintiff to "a mature, emancipated man," but did not find that this status afforded an exemption from the clear words of section 15. Moreover, we note that even if an "emancipated minor" exemption could be read into section 15, it would probably not apply to Maria, for she is not emancipated. New York minors are emancipated by agreement of parent and child, or by unilateral action of the parent. Emancipation is not within the sole power of the child. *Sevrie v. Sevrie*, 90 Misc.2d 321, 394 N.Y.S.2d 389 (Fam.Ct.1977); *Bates v. Bates*, 62 Misc.2d 498, 310 N.Y.S.2d 26 (Fam.Ct.1970). Further, emancipation is generally applied to those over eighteen, see New York Gen.Oblig.Law § 3–101 (McKinney 1977) (declaring contracts of persons over eighteen effective); New York Pub. Health Law § 2504 (McKinney 1977) (allowing persons over eighteen to consent to medical treatment), or over sixteen, see *People ex rel. C. v. Spence-Chapin Services*, 48 U.S.L.W. 2709 (Sup.Ct.N.Y.Co. March 27, 1980) (sixteen-year-old may give up her child for adoption, since no statute disables minors from doing so). Where minors have been treated as adults, see, e. g., New York Penal Law § 30.00 (McKinney Supp. 1979–1980) (youthful offender statute); New York Pub. Health Law § 2305(2) (McKinney 1977) (allowing treatment for venereal disease regardless of age), that practice has been afforded by statute and not by judicial fiat. Moreover, specific problems of public health and safety seem to be the domain covered.

While a proper solicitude for state sovereignty might lead us to abstain where a plausible claim of saving construction is made, we will not elevate resourceful conjurations to probable interpretations in the name of pyrrhic comity. If that were the law, few cases would withstand an abstention attack. In *Napristek v. City of Norwich*, 545 F.2d 815, 818 (2d Cir. 1976) (per curiam), we refused to refrain from constitutional examination of a New York statute because we found the suggested alternative construction "would require the state courts to supply a missing term in the ordinance." In *Pharmaceutical Society*, *supra*, 586 F.2d at 957, we declined to forbear, and stated, "Abstention could hardly be justified on the theory that the state court might invent an interpretation at odds with the statute's clear language." *Accord, Wisconsin v. Constantineau*, 400 U.S. 433, 439, 91 S.Ct. 507, 511, 27 L.Ed.2d 515 (1971); *Zwickler v. Koo-*

ta, 389 U.S. 241, 245–52, 88 S.Ct. 391, 396, 19 L.Ed.2d 444 (1967); *Quinn v. Aetna Life & Cas. Co.*, 616 F.2d 38, 41 (2d Cir. 1980) (per curiam). The crystalline parlance of section 15 has remained unchanged since its enactment over seventy years ago.[9]

The propriety of our rule is confirmed by the Supreme Court's decisions in *Bellotti v. Baird*, 428 U.S. 132, 96 S.Ct. 2857, 49 L.Ed.2d 844 (1976), and *Planned Parenthood v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), decided the same day. In both cases, a state statute required parental consent whenever a female under eighteen desired an abortion. If the parents refused, the statute in *Bellotti* allowed a court to override that refusal "for good cause shown;" the statute in *Danforth* was silent. The Supreme Court held abstention proper in *Bellotti*, since state courts might well cure the constitutional objections through construction of the ambiguous "good cause" term in the statute.[10] The statute in *Danforth* was strikingly similar to section 15: short, clear and unambiguous.[11] The Supreme Court found abstention improper.

Finally, we cannot ignore the urgent equities of plaintiffs' complaint. Aside from our usual reluctance to relegate civil rights plaintiffs to the state courts, *see Wright v. McMann*, 387 F.2d 519, 525 (2d Cir. 1967), this case presents a pressure of time which counsels strongly against the use of abstention. Ricardo has lived as an illegitimate child for over a year; his parents have cohabited out of wedlock for a year-and-a-half. If Maria and Raoul have a constitutional right to marry, its exercise should not be postponed. Such facts "[do] not permit us the luxury of a *Pullman* abstention . . . ." *Billington v. Hayduk*, 565 F.2d 824, 825 (2d Cir. 1977) (per curiam). *Accord, Harman v. Forssenius*, 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50 (1965); *Gangemi v. Sclafani*, 506 F.2d 570, 572 (2d Cir. 1974).

III.

Our decision today does not imply that a colorable claim of saving construction should be ignored. Nor does it require a federal court to reach the constitutional merits of a slightly vague state statute every time a violation of civil rights is alleged. We hold here only that the remote and implausible suggestions of ambiguity surrounding the statute before us do not justify abstention. In drawing the boundary of federalism as we do, we acknowledge the difficulty of our craft in this area of the law.

The order of dismissal is reversed. Since the issue of the constitutionality of section 15 has not been decided below or briefed or argued here, we do not reach it. *See, e. g., McRedmond v. Wilson*, *supra*, 533 F.2d at 764; *Pierce v. La Vallee*, 293 F.2d 233, 236 (2d Cir. 1961). The case is remanded for proceedings consistent with this opinion.

9. For persons under the age of majority, the parental consent requirement has remained intact since the first decade of this century. *See* New York Dom.Rel.Law § 15 (Birdseye, Cumming & Gilbert 1909). New York in 1974 lowered the age of majority from twenty-one years to eighteen, and § 15 was amended accordingly. *See* 1974 N.Y.Laws, ch. 820, § 4. The parental consent provision was not altered.

10. The Supreme Judicial Court of Massachusetts answered the state law questions. *Baird v. Attorney General*, 371 Mass. 741, 360 N.E.2d 288 (1977). The federal district court found the statute unconstitutional as construed, and the Supreme Court affirmed. *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979).

11. The statute in *Danforth* provided in part:
Section 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:
* * * * * *
(4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.
Danforth, *supra*, 428 U.S. at 85, 96 S.Ct. at 2847.

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No. 81 6511

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

CRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Petitioners,

- against -

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State, and DAVID AXELROD, individually and as New York State Commissioner of Health,

Respondents.

MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

The petitioners ask leave to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

Leave to proceed in forma pauperis was sought and granted to the named plaintiff in the District Court below. Petitioners were intervenors in that proceeding, and submitted affidavits regarding their income to the district court.

The petitioner's affidavit in support of this motion is attached.

FRANK A. BRESS
Executive Director
Washington Square Legal
Services, Inc.
JANET M. CALVO, Of Counsel
80 Fifth Avenue, Suite 1501
New York, New York 10011
(212) 924-3200

Attorney for Petitioners

RECEIVED

UNITED STATES SUPREME COURT
UNITED STATES OF AMERICA

CRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Petitioners,

- against -

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State, and DAVID AXELROD, individually and as New York State Commissioner of Health,

Respondents.

AFFIDAVIT

No.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Angel Otero, being first duly sworn, depose and say that I and Vangie Jiminez are the Petitioners in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefore, I state that because of our poverty we are unable to pay the costs of said proceeding or to give security therefore.

I further swear that the following statements relating to our ability to pay the cost of prosecuting the appeal are true.

1. I am presently employed at Tree Communications, 250 Park Avenue South, New York, New York. My wages are $560 per month.

2. I bear full responsibility for the complete support of my fiancee, Vangie Jiminez, and our son, Daniel Otero, who live together with me.

3. We have no checking or savings accounts.

4. We own no real estate, stocks, bonds, notes, automobiles or other valuable property.

5. We were intervenors in the case below and did not need to proceed in forma pauperis. However, I did submit affidavits regarding our income to the district court.

6. We were allowed to proceed pseudonymously below, pursuant to an Order issued in accordance with the Memorandum Opinion of Judge Constance Baker Motley, August 17, 1981, in the Southern District of New York. All true name documents were sealed.

7. I request to proceed pseudonymously here, and that this affidavit bearing our true names be sealed.

Angel M. Otero
ANGEL OTERO

Subscribed and sworn to before
me this 8th day of April, 1982.

Janet M. Calvo
Notary Public

JANET M. CALVO
Notary Public, State of New York
No. 31-4524110
Qualified in New York County
Commission Expires March 30, 1983

JANET M. CALVO
Notary Public, State of New York
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Qualified in New York County
Commission Expires March 30, 1983

JANET M. CALVO
Notary Public, State of New York
No. 31-4524110
Qualified in New York County
Commission Expires March 30, 1984

Let the applicant proceed without payment or costs or fees or the necessity of giving security therefore.

Circuit Justice

No. 81-6511

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

CHRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Cross-Respondents

v.

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York States,

Defendants

and

DAVID AXELROD, individually and as New York State Commissioner of Health,

Cross-Petitioner.

AFFIDAVIT OF SERVICE

JANET CALVO hereby duly sworn deposes and says:

1. I am of counsel to Frank Bress, attorney for petitioners, cross-respondents in this case. My office is at 80 Fifth Avenue, Room 1501, New York, New York 10011.

2. On May 28, 1982, I served copies of Cross-Respondents' Brief in Opposition to Cross-Petition for a Writ of Certiorari by depositing the same in a United States Post Office mailbox with first class postage prepaid, addressed to:

a. Honorable Robert Abrams, Attorney General of the State of New York, Two World Trade Center, New York, New York 10047, Robert J. Schack of Counsel, attorney for David Axelrod and

b. F. Schwartz, Corporation Counsel of the City of New York, 100 Church Street, New York 10007, attorney for David Dinkins.

JANET CALVO

Sworn to before me this
28th day of May, 1982

Notary Public

PAULA GALOWITZ
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-4656934
Qualified in New York County
Commission Expires March 30, 1983

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81 - 6511

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

CRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Petitioners,

-against-

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State, and DAVID AXELROD, individually and as New York State Commissioner of Health,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Dated: New York, New York
May 28, 1982

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PETER H. SCHIFF
Acting Attorney-in-Chief
Appeals and Opinions

ROBERT J. SCHACK
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Questions Presented

1. Whether review should be denied because the principal question raised by petitioner was not squarely raised or passed on below and does not present a substantial federal question?

2. Whether review should be denied since resolution of the erroneous rulings below allowing anonymous prosecution and denying abstention would lead to affirmance of the judgment below without reaching the constitutional questions raised in the petition?

3. Whether review should be denied of the proposed subclass certification question since the petitioners are not members of the purported subclass and have no right to speak for it?

Table of Contents

	Page
Questions Presented	i
Table of Authorities	iii
Preliminary Statement	1
Opinions Below	3
Constitutional Provisions and Statutes Involved	3
Statement of the Case	4
POINT I - REVIEW SHOULD BE DENIED BECAUSE THE PRINCIPAL QUESTION RAISED BY INTERVENORS WAS NOT SQUARELY RAISED OR PASSED ON BELOW AND DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION	4
POINT II - REVIEW SHOULD BE DENIED BECAUSE RESOLUTION OF PRELIMINARY PROCEDURAL AND SUBSTANTIVE ISSUES WOULD LEAD TO AFFIRMANCE OF THE JUDGMENT WITHOUT REACHING THE MERITS OF THE CONSTITUTIONAL QUESTIONS RAISED BY THE PETITION	8
POINT III - REVIEW SHOULD NOT BE GRANTED AS TO CERTIFICATION OF A SUBCLASS OF INFANTS SINCE THERE IS NO PARTY TO THE PETITION WITH STANDING TO RAISE THE QUESTION	11
Conclusion	12
Exhibit "A" - Cross-Petition, Axelrod v Coe, Docket No. 81-2119	

Table of Authorities

Page

I. Table of Cases

Bellotti v Baird, 393 F Supp 847 (D Mass 1975), vac on other gds & rem 428 US 132 (1976), decis on rem 450 F Supp 997 (D Mass 1978), affd 443 US 622 (1979)... 9-10

Bellotti v Baird, 443 US 662 (1979)..... 7-8

Fortunato v Ford Motor Co., 464 F2d 962 (2d Cir), cert den 409 US 1038 (1972)..... 6

H.L. v Matheson, 450 US 398 (1981)..... 8

McGowan v Maryland, 366 US 420 (1961)..... 12

New York City Transit Authority v Beazer, 440 US 568 (1979)..... 11

Parham v J.R., 442 US 584 (1979)..... 8

People ex rel. "C" v Spence-Chapin Services to Families and Children, NYLJ March 27, 1980, p 14 col 2..... 9

Schwartz v S.S. Nassau, 345 F2d 465 (2d Cir), cert den 382 US 919 (1965)..... 6

Singleton v Wolff, 428 US 106 (1976)..... 6

Tennessee v Dunlap, 426 US 312 (1976)..... 6

Tileston v Ullman, 318 US 44 (1943)..... 12

United States v Vitasafe Corp., 352 F2d 62 (2d Cir 1965)..... 6

Village of Hoffman Estates v Flipside, Hoffman Estates, Inc., _____US_____, 102 S Ct 1186 (1982)..... 12

Youakim v Miller, 425 US 231 (1976)..... 6

Page

II. Table of Statutes

U.S. Constitution, Am. I..... 11

_____, Am. XIV..... 5, 11

Domestic Relations Law, § 7..... 6

_____, § 15..... 5-7

_____, § 16..... 3, 6-7

_____, § 140(b)..... 3, 6-7

Public Health Law, § 4135..... 4, 10

III. Table of Other Authorities

Stern & Gressman, Supreme Court Practice, § 6.34 (5th Ed. 1978)..... 2

81 - 6511

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

CRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Petitioners,

-against-

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State, and DAVID AXELROD, individually and as New York State Commissioner of Health,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Respondent State defendant Axelrod (hereinafter "State defendant") respectfully submits that a Writ of Certiorari should not be issued on the Petition of intervenors "Cristina Coe" and "Pedro Doe" ("intervenors") in this Docket.* If a Writ is issued,

* Intervenors were allowed to intervene under pseudonyms as plaintiffs and class representatives by an order of the United States District Court for the Southern District of New York (Motley, D. J.), entered August 17, 1981. The original pseudonymous plaintiffs, "Maria Moe," "Raoul Roe" and "Ricardo Roe," did not petition for certiorari.

the State defendant respectfully urges that a further Writ of Certiorari should be issued in Docket No. 81-2119 on the Cross-Petition of State defendant against intervenors and against plaintiffs "Maria Moe", "Raoul Roe" and "Ricardo Roe" ("plaintiffs") to review the judgment of the United States Court of Appeals for the Second Circuit entered January 11, 1982.* The Cross-Petition was filed as a precaution to assure that the defenses stated in Point II of this Brief in Opposition may be raised in support of the judgment.** To avoid duplication, relevant portions of the Cross-Petition are incorporated by reference (a photocopy of the Cross-Petition is attached as Exhibit "A").

State defendant's Cross-Petition was timely filed by mail May 13, 1982, thirty days after receipt of the Petition (Cross-Petition p 4). The Clerk of the Court granted State defendant an extention to May 28, 1982, to file this Brief in Opposition to the Petition.

---

* Plaintiffs were given leave to proceed under pseudonyms by an ex parte order of the United States District Court for the Southern District of New York (Lasker, D. J.), entered March 19, 1980.

** State defendant maintains that a reversal in his favor on any of the issues raised in Point II of the Brief would only offer a different ground to affirm the judgment of dismissal, rather than vary the judgment itself, and that the issues could therefore be raised as defenses to the Petition without a Cross-Petition. Stern & Gressman, Supreme Court Practice, § 6.34 at 478 (5th Ed. 1978). The Cross-Petition was filed, however, to avoid any question as to raising those issues solely as defenses.

Opinions Below

The opinions below are summarized in State defendant's Cross-Petition at pp 2-4.

Constitutional Provisions and Statutes Involved

In addition to the constitutional provisions and statutes printed at pp 4-8 of the Cross-Petition, New York Domestic Relations Law § 16 (McKinney 1977) reads as follows:

> § 16. False statements and affidavits.
>
> Any person who shall in any affidavit or statement required or provided for in this article wilfully and falsely swear in regard to any material fact as to the competency of any person for whose marriage the license in question or concerning the procuring or issuing of which such affidavit or statement may be made shall be deemed guilty of perjury and on conviction thereof shall be punished as provided by the statutes of this state.

New York Domestic Relations law § 140 (McKinney 1977) reads in relevant part as follows:

> § 140. Action for judgment declaring nullity of of void marriages or annulling voidable marriage.
>
> * * *
>
> (b) Party under age of consent. An action to annul a marriage on the ground that one or both of the parties had not attained the age of legal consent may be maintained by the infant, or by either parent of the infant, or by the guardian of the infant's person; or the court may allow the action to be maintained by any person as the next friend of the infant. But a marriage shall not be annulled under this subdivision at the suit of a party who for any time after he or she attained that age freely cohabited with the other party as husband or wife.
>
> * * *

New York Public Health Law § 4135 (McKinney Supp 1981) reads as follows:

§ 4135. Birth certificate; child born out of wedlock

1. (a) There shall be no specific statement on the birth certificate as to whether the child is born in wedlock or out of wedlock or as to the marital name or status of the mother.

(b) The phrase "child born out of wedlock" when used in this article, refers to a child whose father is not its mother's husband.

2. The name of the putative father of a child born out of wedlock shall not be entered on the certificate of birth prior to filing without the consent in writing of both the mother and father, duly verified, and file with the record of birth, except that with respect to a child born out of wedlock to a married woman, a determination of parentage made by a court of competent jurisdiction shall be required before the putative father's name may be entered on the birth certificate.

3. Order relating to parentage shall be held confidential by the commisssioner and shall not be released or otherwise divulged except by order of a court of competent jurisdiction.

Statement of the Case

The statutes and facts relevant to this Brief are stated in the Cross-Petition at pp 8-11.

REASONS FOR DENYING THE PETITION

POINT I

REVIEW SHOULD BE DENIED BECAUSE THE PRINCIPAL QUESTION RAISED BY INTERVENORS WAS NOT SQUARELY RAISED OR PASSED ON BELOW AND DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The Petition raises two questions but only briefs the first. The first question is stated as follows:

> "Does New York state violate the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution by denying law abiding minors between fourteen and eighteen, even when pregnant, any opportunity to demonstrate their capacity to marry if any one parent objects to the marriage, while affording to minors who have lied or otherwise circumvented state law to marry, a full judicial hearing on capacity to marry, even over the objections of all parents?"

The question stated was not properly raised below and bears little resemblance to the New York statutory scheme. It is also, on its face and under this Court's precedents, not substantial enough for review.

Intervenors' summary judgment brief in trial court made no attempt to contrast the hearing rights of persons who comply with and of those who circumvent the provisions of Domestic Relations Law (DRL) § 15 requiring parental consent for the marriage of minors.* Intervenors' main summary judgment appeal brief likewise was silent on this point. The argument based on the alleged contrast in rights was first rasied in a single paragraph in their Reply Brief on the merits in the court below (pp 12-3), at which stage State defendant had no right or opportunity to brief the issue. Since intervenors did not allege exceptional circumstances justifying their failure to raise the claim earlier, they were not entitled to raise it at that late stage of the litigation. See

---

* State defendant argued in district court that plaintiffs' summary judgment motion and supporting brief were not properly filed on behalf of intervenors. Intervenors argued they were properly parties to the motion. For the purpose of the present petition, it does not matter whether intervenors were formally parties to plaintiffs' summary judgment papers, for neither those papers nor any others that intervenors submitted in district court clearly raised the contrasting rights as asserted here as a separate issue.

Singleton v. Wolff 428 US 106, 120-1 (1976); Fortunato v. Ford Motor Co., 464 F2d 962, 967 (2d Cir), cert den 409 US 1038 (1972); United States v. Vitasafe Corp., 352 F2d 62, 63 (2d Cir 1965); Schwartz v. S.S. Nassau, 345 F2d 465, 466 (2d Cir), cert den 382 US 919 (1965). Furthermore, neither court below mentioned the claim in any of their seven opinions on dismissal, class certification or summary judgment.

In Tennesse v. Dunlap, 426 US 312, 316 n 3 (1976), the Court refused to pass on a constitutional claim that

> "was not pleaded in respondent's complaint [and] was not considered by the District Court or the Court of Appeals...."

In the present case, the question raised was not pleaded in intervenors' complaint or summary judgment papers and was not passed on by either court below. Review should be denied because there are no exceptional circumstances requiring this Court to be the first to pass on it. See Youakim v. Miller, 425 US 231, 234 (1976); Singleton v. Wolff, supra, 428 US at 120.

In any event, the question intervenors raise significantly misstates New York law in several respects. Most importantly, they fail to acknowledge that a minor who circumvents DRL § 15 in order to marry is subject to criminal penalties for perjury. DRL § 16. Furthermore, the hearing on capacity to marry of which intervenors make much is a hearing to annul the marriage not to authorize it, may be held even if the minor did comply with DRL § 15 in obtaining parental consent, may be held over the minor's objection, and may expose the minor to prosecution for

perjury. DRL §§ 7(1), 140(b). The posited comparison between minors who would like a hearing under DRL § 15 and those subjected to annulment or criminal hearings pursuant to DRL §§ 7, 16, 140, is thus highly inaccurate.

Even assuming the comparison were valid, it presents a trivial federal question. Of course, persons obeying a law and persons being prosecuted for violating it have different rights to a hearing. Intervenors' claim would apply to any statute which prohibits or restricts the exercise of a right or privilege. There will always be those who seek, sometimes successfully, to circumvent such a statute. For example, in most states, law abiding minors cannot purchase alcoholic beverages. Many minors seek to circumvent the drinking laws by presenting false identification. But the likelihood that people will seek to evade such a law does not render the law unconstitutional or give rise to a constitutional right to a hearing to avoid the law's ambit.

Finally, even assuming that the question intervenors present brings up the underlying question of the constitutionality of a statute requiring parental consent for the marriage of a fifteen year old child, the issue does not warrant further review. As we discuss in Point II infra and more fully in Cross-Petition Point II, there are serious questions as to whether the courts below correctly interpreted the statute they upheld. Moreover, the decisions below are totally in line with this Court's precedents. In Bellotti v Baird, 443 US 622, 637 (1979), the Court outlined

the substantial arguments justifying "state deference to parental control over children...." While the Court found that parental consent was not required in all cases before a mature minor could obtain an abortion, it specifically noted, id., 443 US at 642, that:

> "[t]he present minor's options are much different from those facing a minor in other situations, such as deciding whether to marry. A minor not permitted to marry before the age of majority is required simply to postpone her decision. She and her intended spouse may preserve the opportunity for later marriage should they continue to desire it."

Since it can be presumed that parents will generally act in the best interests of their children, Parham v. J.R., 442 US 584, 602 (1979), the possibility that a few parents may not do so does not require legislatures to abandon age-based parental consent requirements in favor of judicial review whenever a parent refuses a child's request. H.L. v. Matheson, 450 US 398, 425 (1981) (Stevens, J., concurring).

POINT II

REVIEW SHOULD BE DENIED BECAUSE RESOLUTION OF PRELIMINARY PROCEDURAL AND SUBSTANTIVE ISSUES WOULD LEAD TO AFFIRMANCE OF THE JUDGMENT WITHOUT REACHING THE MERITS OF THE CONSTITUTIONAL QUESTIONS RAISED BY THE PETITION.

A Writ should not issue because the Court is likely to affirm the judgment of dismissal without reaching the merits of the constitutional questions raised in the Petition. Correcting the erroneous rulings below allowing anonymous prosecution and denying abstention would provide alternative, non-constitutional grounds for affirmance. See Cross-Petition Point I, outlining

how the courts below erred in allowing plaintiffs and intervenors to proceed while concealing their identities from defendants, and Cross-Petition Point II, showing how the Second Circuit erred in requiring the district court not to abstain from deciding the constitutionality of a State statute with major, relevant ambiguities.

Continuing research has found an additional case not cited in the courts below that is of relevance on Cross-Petition Point I as incorporated by reference in this Point. The district court in Bellotti v Baird, 393 F Supp 847 (D Mass 1975), vac on other gds & rem 428 US 132 (1976), decis on rem 450 F Supp 997 (D Mass 1978), affd 443 US 622 (1979), allowed plaintiff to proceed anonymously as to defendants because revealing her name or checking her claims with her parents, classmates, etc., might infringe upon the very privacy rights the case was brought to vindicate. 393 F Supp at 849-50. The ruling in question is of limited authority since it was not reviewed on appeal, since the controlling rulings in the same decision were vacated and the case remanded, and since the factual and legal situation were quite different from the present case. Moreover, the district court's opinion does not suggest that the plaintiff's name was concealed from defendants' counsel. In fact, her standing was determined following "examination and cross-examination in camera" as to her maturity with respect to the abortion decision. 393 F Supp at 850.

In the present case, the standing issue is significantly different. Just as it takes more maturity to raise a child out-of-wedlock than to execute a valid surrender of adoption, see People ex rel. "C" v Spence-Chapin Services to Families and Children, NYLJ March 27, 1980, p 14, col 2, at col 3, so too, the decision

to marry, live together and raise a family demands far more maturity than the decision to abort an unplanned pregnancy. State defendant was entitled to seek relevant evidence on the questions of maturity and of best interests from those who had observed Ms Coe acting in a variety of roles, for instance, as neighbor, classmate, consort, mother, or daughter. Furthermore, since intervenors' claims as to whether and why Mrs. Coe refused consent are hearsay, her testimony was essential to support or rebut their allegations. Thus, the determination of intervenors' standing could not in this case, as it was in Bellotti, be made on the basis of the minor's testimony alone. Failure to provide additional evidence supporting standing would require dismissal. See Bellotti v Baird, supra, 393 F Supp at 849 n 1 (dismissing three proposed pseudonymous plaintiffs at the outset of the case "for want of proof" because "no evidence supporting their standing was introduced...").

Unlike the situation in Bellotti, the core of intervenors' claims do not turn on privacy from family and friends. Indeed, Ms Coe's pregnancy and unwed status were admittedly known to her mother and many of the other persons who might be called for evidence. Moreover, once her child was born and its birth certificate filed, her identity and unlegitimated childbirth would be known to State defendant; only her status as the particular unwed mother in this case would be uncertain.*

* Under New York Public Health Law § 4135, a birth certificate should not be marked to show the birth was out of wedlock, but in practice, under today's conditions, that conclusion is drawn from the absence of a father's name from a New York City certificate, particularly one from a public hospital.

Concealing intervenors' identities thus failed significantly to protect their privacy interests while it prevented the State defendant from preparing a full defense. Had intervenors' identities been disclosed and discovery and/or testimony been taken, the trial court might well have been able to resolve the case on the basis that the intervenors lacked standing, without reaching the constitutional issues presented. See New York City Transit Authority v Beazer, 440 US 568, 582 & n 21 (1979).

POINT III

REVIEW SHOULD NOT BE GRANTED AS TO CERTIFICATION OF A SUBCLASS OF INFANTS SINCE THERE IS NO PARTY TO THE PETITION WITH STANDING TO RAISE THE QUESTION.

Intervenors did not even brief the subclass question stated in their Petition. Moreover, in district court, Ricardo Roe an infant represented by his father, was proposed as the representative of a class of infants born or about to be born to certain minor parents. In the court below, the purported subclass Ricardo was to represent was narrowed to infants already born. Ricardo and his parents declined to seek certiorari and are now time-barred from doing so. While Cristina Coe and Pedro Doe allegedly had a child before the district court rendered judgment here, they never sought to intervene their child as a party plaintiff and class representative. Nor have they claimed in this Court or below to be members of the purported subclass. Since procedural due process and not a First Amendment claim is at issue, they

have no standing to assert the rights of members of the purported subclass. Village of Hoffman Estates v Flipside, Hoffman Estates, Inc., ___ US ___, 102 S Ct 1186, 1198 (1982) (White, J., concurring); McGowan v Maryland, 366 US 420, 429 (1961); Tileston v Ullman, 318 US 44, 46 (1943). Since no party to the Petition would have standing to seek review of the subclass issue or to assert it if a Writ were issued, review of this question should be denied.

CONCLUSION

FOR THE REASONS STATED, A WRIT OF CERTIORARI SHOULD BE DENIED. IF A WRIT IS ISSUED, A FURTHER WRIT SHOULD BE ISSUED ON THE CROSS-PETITION IN DOCKET NO. 81-2119.

Dated: New York, New York
May 28, 1982

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Attorney for Respondent Axelrod

PETER H. SCHIFF
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Appeals and Opinions

ROBERT J. SCHACK
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No.

IN THE

Supreme Court of the United States

October Term, 1981

MARIA MOE, RAOUL ROE, RICARDO ROE, an infant, by his father, RAOUL ROE, CRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Cross-Respondents,

against

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State,

Defendants,

and

DAVID AXELROD, individually and as New York State Commissioner of Health,

Cross-Petitioner.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: New York, New York
May 13, 1982

Exhibit "A"

Questions Presented

1. Whether review should be granted of the novel rulings below allowing plaintiffs and intervenors to conceal their identities from State defendant, thus preventing the State defendant from preparing a full defense against class certification and on the merits which might have avoided constitutional questions?

2. Whether review should be granted of the rulings below denying abstention although the statute in question contains relevant, major ambiguities under New York case law, one of which has been identified by New York's highest court and another by a trial court?

TABLE OF CONTENTS

	PAGE
Questions Presented	1
Opinions Below	2
Jurisdiction	4
Constitutional Provisions and Statutes Involved	4
Statement of the Case	8
A. Statutes	8
B. Plaintiffs Maria Moe, Raoul Roe and Ricardo Roe	8
C. Intervenors Cristina Coe and Pedro Doe	10
Reasons for Granting the Conditional Cross-Petition	12
Point I—Review should be granted of the novel rulings below that plaintiffs and intervenors could conceal their identities from the State defendant, thus preventing the State defendant from preparing a full defense as to class certification and on the merits which might have avoided constitutional questions	12
Point II—Review should be granted of the rulings below denying abstention because the statute in question contains relevant, major ambiguities under New York case law, one of which has been identified by New York's highest court and another by a trial court	16
Conclusion	20
Appendix	
Memorandum Opinion	1a

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PAGE

Cases:

Adickes v. H.S. Kress & Co., 398 U.S. 144 (1970) 14

Berger v. Adornato, 76 Misc. 2d 122 (Onondaga Co. Sup. 1973) 19–20

Buxton v. Ullman, 147 Conn. 48, 156 A.2d 508 (1959), *app. dismd. sub nom.* Poe v. Ullman, 367 U.S. 497 (1961) 12

Carr v. Hoy, 2 N.Y.2d 185 (1957) 19

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Doe v. Poelker, 432 U.S. 519 (1977) 13

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H.L. v. Matheson, 450 U.S. 398 (1981) 14–15

Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981) 19

Matter of Bennett v. Jeffreys, 40 N.Y.2d 543 (1976) 16–17

Matter of Jean C., N.Y.L.J. Nov. 25, 1980, p. 13, col. 2 (Queens Fam.), *aff'd*, —— A.2d ——, 447 N.Y.S. 2d 524 (2d Dept.) 18

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Matter of Rivera, 109 Misc. 2d 501 (Bronx Surr. 1981) 16–17

Matter of Rogers, 36 Misc. 2d 680 (Schuyler Fam. 1962) 19

Matter of Rugovac, 77 Misc. 2d 659 (Bronx Surr. 1974) 17, 20

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PAGE

Moe v. Dinkins, Civil Action No. 80 Civ. 1577 (S.D. N.Y. July 10, 1980) 2
Moe v. Dinkins, 635 F.2d 1045 (2 Cir. 1980) 3, 17
Moe v. Dinkins, 80 Civ. 1577 (S.D.N.Y August 17, 1981) 3
Moe v. Dinkins, 533 F. Supp. 623 (S.D.N.Y. 1981) 3, 17
Moe v. Dinkins, 669 F.2d 67 (2 Cir. 1982) 4

New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) 20

Olmstead v. United States, 277 U.S. 438 (1928) 20

People v. Benu, 87 Misc. 2d 139 (Kings Co. Crim. 1976) 20

Railroad Commission v. Pullman Co., 312 U.S. 496 (1941) 2, 16–17
Roe v. Ingraham, 364 F. Supp. 536 (S.D.N.Y 1973), *rev'd on other gds. sub nom.* Whalen v. Roe, 429 U.S. 589 (1977) 13

Skagen v. New York City Employees' Retirement System, 103 Misc. 2d 448 (N.Y. Co. Sup. 1981) 18

Constitution:

U.S. Const., Amend. VI 4, 12
U.S. Const., Amend. XIV 4

PAGE

Statutes:

New York Dom. Rel. Law § 13 (McKinney 1977) 5
New York Dom. Rel. Law § 15 (McKinney 1977) 2–3, 8–9, 14, 16–19
New York Dom. Rel. Law § 15(2) 17
New York Dom. Rel. Law § 15(3) 17
New York Dom. Rel. Law § 15-a (McKinney 1977) 6, 8, 10
New York Educ. Law § 3212 (McKinney 1981) 16
New York Fam. Ct. Act § 712(b) (29A) 10
New York Penal Law § 260.05 (McKinney 1975) 7, 19
New York Penal Law § 260.10 (McKinney 1975) 7–8, 19
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28 U.S.C. § 1254(1) (1966) 4

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1973 Op. Atty. Gen. 144 16

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No.

IN THE

Supreme Court of the United States

October Term, 1981

MARIA MOE, RAOUL ROE, RICARDO ROE, an infant, by his father, RAOUL ROE, CRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Cross-Respondents,

against

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State,

Defendants,

and

DAVID AXELROD, individually and as New York State Commissioner of Health,

Cross-Petitioner.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Cross-petitioner Axelrod respectfully prays that if a Writ of Certiorari is issued in Docket No. 81-6511 on the petition of "Cristina Coe" and "Pedro Doe" (hereinafter "intervenors"),* to review the judgment of the United States Court of Appeals for the Second Circuit filed on January 11, 1982, that a further Writ of Certiorari be issued on his cross-petition in this Docket to review said judgment. The cross-petition is filed as a precaution to assure that certain defenses may be raised in support of the judgment.**

Opinions Below

In the initial judgment entered on July 17, 1980, upon an unpublished decision dated July 10, 1980 (Appendix to this cross-petition), the United States District Court for the Southern District of New York dismissed the complaint filed by plaintiffs Maria Moe and Raoul and Ricardo Roe (hereinafter "plaintiffs"). District Judge Motley agreed with State defendant's position that abstention was appropriate under *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941). She found that several alternative constructions might be applied by the State courts to Domestic Relations Law (DRL) § 15, the New York stat-

* Intervenors were allowed to intervene under pseudonyms as plaintiffs and class representatives by the District Court's order entered on August 17, 1981. The original pseudonymous plaintiffs, "Maria Moe," "Raoul Roe" and "Ricardo Roe," did not petition for certiorari.

** The State defendant maintains that a reversal in his favor on any of the issues raised on the cross-petition would only offer a different ground for the judgment of dismissal, rather than vary the judgment itself, and that the issues could therefore be raised as defenses to the petition without a cross-petition. Stern & Gressman, *Supreme Court Practice*, § 6.34 at 478 (5th Ed. 1978). This cross-petition is filed, however, to avoid any question as to raising these issues solely as defenses.

ute which delineates the circumstances under which parental consent to a minor's marriage is required, in avoidance of the constitutional issues plaintiffs had raised. In a judgment and decision dated December 9, 1980, and published at 635 F.2d 1045 (Appendix "D" to the petition), the United States Court of Appeals for the Second Circuit (*Kaufman*, C.J.) reversed, stating that DRL § 15 was clear and that New York courts had always interpreted the statute literally.

On remand, District Judge Motley entered an order on June 29, 1981, upon an unpublished decision of the same date (Appendix "C" to the petition), certifying a plaintiff class consisting of all New York persons who wish to marry but cannot do so because of a lack of parental consent and a defendant class of all New York town and city clerks. The district court refused, however, to certify a plaintiff subclass of children born or about to be born out of wedlock to such minors.

By an order entered on August 17, 1981, upon a decision of the same date published at 533 F. Supp. 623 (Appendix "B" to the petition), District Judge Motley granted the motion of Cristina Coe and Pedro Doe to intervene as party plaintiffs and additional class representatives and to proceed without guardians *ad litem* and under pseudonyms. The same order denied plaintiffs' motion for summary judgment and granted summary judgment in defendants' favor. Judgment was entered on August 25, 1981. The district court held that the parental consent requirement was not unconstitutional. Rather, the court found that the requirement is rationally related to the State's legitimate interests in fostering mature decisions regarding the proposed marriage of a minor, in preventing unstable marriages, and in

supporting the fundamental right of a parent to act in the best interests of his or her child free from State restraint.

By judgment and *per curiam* decision of January 11, 1982, published at 669 F.2d 67, the court below affirmed in all respects. It generally adopted the district court's reasoning.

Jurisdiction

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The judgment and opinion of the Court of Appeals for the Second Circuit were filed on January 11, 1982. State defendant received the petition of Cristina and Pedro on April 13, 1982. This cross-petition is timely filed, pursuant to Rule 19.5, within thirty days of the latter date.

Constitutional Provisions and Statutes Involved

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . . .

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Domestic Relations Law § 13 (McKinney 1977) provides in relevant part:

> It shall be necessary for all persons intended to be married in New York state to obtain a marriage license . . . .

New York Domestic Relations Law § 15 (McKinney 1977) provides in relevant part:

> 2. . . . If it shall appear upon an application of the applicants as provided in this section or upon information required by the clerk that the man is under eighteen years of age and is not under sixteen years of age, or that the woman is under the age of eighteen and not under fourteen years of age, then the town or city clerk before he shall issue a license shall require the written consent to the marriage from both parents of the minor or minors or such as shall then be living, or if the parents of both are dead, then the written consent of the guardians of such minor or minors. If one of the parents has been missing and has not been seen or heard from for a period of one year preceding the time of the application for the license, although diligent inquiry has been made to learn the whereabouts of such parent, the town or city clerk may issue a license to such minor upon the sworn statement and consent of the other parent. If the marriage of the parents of such a minor has been dissolved by decree of divorce or annulment, the consent of the parent to whom the court which granted the decree has awarded custody of such minor shall be sufficient. If there is no parent or guardian of the minor or minors living to their knowledge then the town or city clerk shall require the written consent for the marriage of the person under whose care or government the minor or minors may be before a license shall be issued.

> If a parent of such minor has been adjudicated an incompetent, the town or city clerk may issue a license to such minor upon the production of a certified copy of such judgment so determining and upon the written consent of the other parent. If there is no other parent whose consent is required by this section, then, the town or city clerk shall require the written consent of the guardian of such minor or of the person under whose care or government the minor may be before a license shall be issued . . . .
>
> 3. If it shall appear upon an application for a marriage license that the woman is under the age of sixteen years and is not under fourteen years of age, the town or city clerk shall require, in addition to the consents provided in this section, the written approval and consent of a justice of the supreme court or of a judge of the family court, having jurisdiction over the town or city in which the application is made, to be attached to or endorsed upon the application, before the license is issued . . . .

New York Domestic Relations Law § 15-a (McKinney 1977) provides in relevant part:

> Any marriage in which the man is under the age of sixteen years or in which the woman is under the age of fourteen years is hereby prohibited . . . .

New York Social Services Law § 145 (McKinney 1976) provides in relevant part:

> 1. Any person who by means of a false statement or representation, or by deliberate concealment of any material fact, or by impersonation or other fraudulent device, obtains or attempts to obtain, or aids or abets any person to obtain public assistance or care to which he is not entitled, or does any wilful act designed to

> interfere with the proper administration of public assistance and care, shall be guilty of a misdemeanor, unless such act constitutes a violation of a provision of the penal law of the state of New York, in which case he shall be punished in accordance with the penalties fixed by such law .... Whenever a social services official has reason to believe that any person has violated any provision of this section, he shall promptly refer the facts and evidence available to him to the appropriate district attorney or other prosecuting official who shall immediately evaluate the facts and evidence and take appropriate action.

New York Penal Law § 260.05 (McKinney 1980) provides in relevant part:

> A person is guilty of non-support of a child when, being a parent, guardian or other person legally charged with the care or custody of a child less than sixteen years old, he fails or refuses without lawful excuse to provide support for such child when he is able to do, or becomes unable to do so, when, though employable, he voluntarily terminates his employment, voluntarily reduces his earning capacity or fails to diligently seek employment.
>
> Non-support of a child is a class A misdemeanor.

New York Penal Law § 260.10 (McKinney 1980) provides in relevant part:

> A person is guilty of endangering the welfare of a child when:
>
> 1. He knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a male child less than sixteen years old or a female child less than seventeen years old or directs or authorizes such

child to engage in an occupation involving a substantial risk of danger to his life or health; or

2. Being a parent, guardian or other person legally charged with the care or custody of a child less than eighteen years old, he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming an "abused child," a "neglected child," a "juvenile delinquent" or a "person in need of supervision," as those terms are defined in articles ten and seven of the family court act.

Endangering the welfare of a child is a class A misdemeanor.

Statement of the Case

A. Statutes

Under DRL § 15, boys aged sixteen or seventeen and girls aged fourteen through seventeen who wish to marry need the consent of their competent, living, custodial parents, guardians or persons caring for them. For girls fourteen or fifteen years old, judicial approval is also required. Under DRL § 15-a, marriages by younger minors are prohibited.

B. Plaintiffs Maria Moe, Raoul Roe and Ricardo Roe

The instant case was originally brought by plaintiffs Maria Moe, Raoul Roe and Ricardo Roe. They obtained permission to proceed under pseudonyms by *ex parte* motion on March 19, 1980. Plaintiffs refused numerous requests for disclosure of their true identities. They first provided copies of the *ex parte* pseudonym motion papers, and only in redacted form, over a year later, on June 2, 1981, in reply

to State defendant's opposition to plaintiffs' motion for summary judgment.

Ms. Moe alleged that she was born on March 2, 1965, and Mr. Roe that he was born March 9, 1962. Accordingly, she was fifteen years old and he eighteen when this action commenced. Their son, Ricardo Roe, allegedly was born on August 21, 1979.

Ms. Moe and Mr. Roe asserted that they wished to marry for several reasons, including the legitimization of Ricardo Roe. They claimed they could not marry because Mrs. Moe, Maria's mother, refused to consent allegedly because she wished to obtain public assistance illegally by fraudulently claiming that Ms. Moe was still a member of her household.* Plaintiffs asserted that the parental consent requirement of DRL § 15 violated their substantive due process and equal protection rights. In the appeal on the merits below, they added a claim that the failure to provide a hearing to review a parent's refusal of consent violated their procedual due process rights.

Ms. Moe sought to represent a class of minors seeking to marry but prevented from doing so by lack of parental consent, Mr. Roe a class of persons seeking to marry such minors, and Ricardo Roe a class of infants born or about to be born to such minors. On appeal, Ricardo Roe's proposed class was modified to a subclass of infants already born. They also applied to certify a defendant class of town and city clerks.

* Only Mrs. Moe's consent was needed because she was allegedly Maria's only surviving parent and because Raoul did not need parental consent, allegedly being eighteen years old.

In trial court, plaintiffs never specified whether their requests for consent were made when Ricardo Roe was conceived, or thereafter. Based on a normal gestation period of nine months, Ricardo Roe was conceived in November, 1978, when Ms. Moe was thirteen years, nine months old. Under DRL § 15-a, the validity of which plaintiffs have never challenged, they could not have married at that time even with parental consent.

In trial court, plaintiffs also never explicitly claimed that Maria was a mature or emancipated minor. Ms. Moe never claimed to be attending school, nor did she explain how Ricardo Roe was cared for while, or if, she was at school, although she was subject to the compulsory education laws. Family Court Act (FCA) § 712(b) (29A). At the outset of the action, plaintiffs alleged that they lived independently "as a family unit" supported by Mr. Roe and occasional household employment by Ms. Moe. Subsequently, however, plaintiffs moved in with Mrs. Roe, Mr. Roe's mother. Although certain papers alleged that they paid rent to Mrs. Roe, other papers omit that claim. In none of their papers did plaintiffs indicate how much rent they paid or what proportion that was of Mrs. Roe's rent, nor did they indicate whether they maintained a separate household (in terms of living, eating, and financial arrangements) within Mrs. Roe's apartment.

Plaintiffs "have decided not to appeal here." Petition for Certiorari, p. 1 n."*".

C. Intervenors Cristina Coe and Pedro Doe

Cristina Coe and Pedro Doe moved to intervene under pseudonyms as plaintiffs and as additional repre-

sentatives of the class of minors and persons who wish to marry them. Cristina Coe allegedly was born on October 19, 1965, Pedro Doe on May 9, 1964, and their son, "Daniel Doe", in August, 1981. Assuming a normal gestation period of nine months, Daniel Doe was conceived a few weeks subsequent to Ms. Coe's fifteenth birthday.

Like the plaintiffs, Ms. Coe and Mr. Doe asserted that they wished to marry for several reasons, including the legitimization of Daniel Doe, but could not do so because Ms. Coe had been unable to obtain the requisite parental consent.* Indeed, Ms. Coe alleged that she was abandoned by Mrs. Coe, her mother, and did not even know her whereabouts. Intervenors raised the same constitutional claims as plaintiffs.

In trial court, Ms. Coe never explicitly claimed to be a mature or emancipated minor. Although subject to the compulsory education laws, she apparently did not attend school. Ms. Coe and Mr. Doe never lived together as an independent family unit. Rather, they admitted that they lived with Mr. Doe's father, stepmother, and stepsiblings and shared the household chores. They claimed to eat separately from other members of the household and to pay for their lodging out of Mr. Doe's earnings, but failed to state how much rent they paid or what proportion that was of the senior Mr. Doe's rent.

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* Only Mrs. Coe's consent was needed because she was allegedly Ms. Coe's custodial parent and because Mr. Doe's parents allegedly had consented.

Reasons for Granting the Conditional Cross-Petition

POINT I

Review should be granted of the novel rulings below that plaintiffs and intervenors could conceal their identities from the State defendant, thus preventing the State defendant from preparing a full defense as to class certification and on the merits which might have avoided constitutional questions.

Review should be granted on the cross-petition of the novel and important question of whether a plaintiff can conceal his or her identity from the defendant where the defendant objects and where the information is reasonably necessary for a defense which might resolve the case without deciding constitutional issues.

In criminal law, the right to know one's accuser is of constitutional dimension. U.S. Const. Am. VI. In civil cases as well, there is a strong public policy for "appris[ing] the parties of their opponents," *Doe* v. *Rostker*, 89 F.R.D. 158, 160 (N.D. Cal. 1981), and allowing defendants to test the *bona fides* of plaintiffs and their claims, *see Buxton* v. *Ullman*, 147 Conn. 48, 156 A.2d 508, 514 (1959), *app. dismd. sub nom. Poe* v. *Ullman*, 367 U.S. 497 (1961). Disclosure also avoids technical problems such as "potential inability to fix *res judicata*." *Doe* v. *Rostker*, *supra*, 89 F.R.D. at 162.

Concern for privacy *vis-a-vis* the public does not justify total anonymity even in "public interest" civil litigation, nor does fear of well-founded prosecution for crime

justify concealing plaintiffs' identities. *See Doe* v. *Plyler*, 458 F. Supp. 569, 572 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5 Cir. 1980), *prob. juris. noted*, 451 U.S. 968 (1981). Indeed, our research fails to show a single case in which the attorney-client privilege has been allowed to conceal the identity of a plaintiff from the defendant he has sued. *See* Annotation, "Disclosure of Name, Identity, Address, Occupation, or Business of Client as Violation of Attorney-Client Privilege", 16 A.L.R. 3d 1047, 1050-6 (1967). The only case found by the parties in the courts below where defendants did not know the plaintiffs' identities is *Roe* v. *Ingraham*, 364 F. Supp. 536, 541 n.7 (S.D.N.Y 1973), *rev'd on other gds. sub nom. Whalen* v. *Roe*, 429 U.S. 589 (1977). In *Ingraham*, it appears that the challenge was only directed to establishing that plaintiffs were real people, not to learning their names. In *Doe* v. *Poelker*, 497 F.2d 1013 (8 Cir. 1974), *on remand*, 515 F.2d 541 (8 Cir. 1975), *rev'd*, 432 U.S. 519 (1977) (*per curiam*), which the plaintiffs and intervenors also cited below as a similar example, the plaintiff's identity was initially unknown to defendants. 497 F.2d at 1065 n.2. By the time of trial her identity was disclosed to defendants and testimony was taken about her personal affairs. 515 F.2d at 542-3. Moreover, this Court held that while plaintiff's legal theories could be *rejected* as a matter of law, based on such facts as had been established or pled, there were relevant factual disputes, as to her affairs and other matters, which would have to be resolved before relief could be *granted*. 432 U.S. at 519-20 & n.1.

The rulings below of the district court, affirmed by the court of appeals, that plaintiffs and intervenors could proceed under pseudonyms, are, on the facts, consistent with

Poelker, since judgment was ultimately entered against plaintiffs as a matter of law in both cases. But the State defendant has consistently asserted that the true identities of the plaintiffs and intervenors were highly relevant at an earlier stage of the litigation. Their trial court claim was that mature minors have a constitutional right to marry without parental consent. But that claim is predicated on an assertion supported by conflicting allegations as to their maturity and hearsay factual assertions that the girls' mothers refused to consent. If Ms. Moe and Ms. Coe were not mature, then they concededly had no constitutional right to marry. If the mothers did consent, plaintiffs and intervenors could have married under DRL § 15.

Without knowledge of their true identities, the State defendant was unable to verify any of their factual allegations. For instance, the State defendant wanted to interview the parents of the plaintiffs and the intervenors as to whether and why they refused consent and to seek evidence from neighbors, employers, teachers and family as to their independence and maturity. Such facts were relevant to the standing of plaintiffs and intervenors to raise constitutional claims on their behalves or as class representatives. Their identities had to be disclosed so that State defendant could prepare a full defense on the class certification issue and on the merits of plaintiffs' summary judgment motion. The failure to disclose entitled State defendant to dismissal without reaching the merits. *See Adickes* v. *H.S. Kress & Co.*, 398 U.S. 144, 160-1 (1970).

In *H.L.* v. *Matheson*, 450 U.S. 398 (1981), the minor plaintiff challenged a statute requiring notice to her parents of a proposed abortion. The Court reviewed her plead-

ings and the trial testimony. On finding that she had failed to claim or establish maturity, the Court narrowed the constitutional question for review to what rights did she have as a non-mature minor. 450 U.S. at 405-7. In the present case, plaintiffs and intervenors conceded that only mature minors would even arguably have a right to marry without parental consent. Thus, a finding of lack of maturity would have mooted any need to reach the constitutional issues. Under the Court's prudential rules, the non-constitutional issues should have been resolved first, even though the courts below went on to uphold the statute's constitutionality. *See New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 582 & n.21 (1979).

Allowing plaintiffs to proceed under pseudonyms without disclosing their identities clashed with strong public policy. It presents a novel issue, arguably at odds with this Court's rulings in analogous cases. Resolution of the question in favor of State defendant may allow the Court here, and other courts in future pseudonymous actions, to determine the proceedings without unnecessarily deciding constitutional questions. Accordingly, review should be granted.

POINT II

Review should be granted of the rulings below denying abstention because the statute in question contains relevant, major ambiguities under New York case law, one of which has been identified by New York's highest court and another by a trial court.

The New York Court of Appeals has found DRL § 15 ambiguous, noting that it is not clear whether a non-parent in whose custody a parent leaves his or her child may qualify as a "guardian" for purposes of consenting to marriage, even in the absence of a court appointment. *Matter of Bennett* v. *Jeffreys*, 40 N.Y.2d 543, 551 (1976). *Cf.* Education Law § 3212 (McKinney 1981). Assuming *arguendo* that Mrs. Coe did not simply desert her daughter in violation of the criminal law, see pp. 7-8, *supra*, then the persons in whose care Ms. Coe was left possibly may be able to consent to her marriage under the statute. Accordingly, abstention was proper under *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941).

There is also an ambiguity under DRL § 15 as to when a court may appoint a guardian. On the one hand, the statute has been read to bar appointment of a guardian who will consent to the child's marriage if the parents of an infant refuse. 1973 Op. Atty. Gen. 144. On the other hand, a distinguished member of the Surrogate's Court has held that DRL § 15 would allow the court to grant letters of guardianship for the purpose of consenting to marriage if the parents are not available and the judge is satisfied that the infant's best interests will be promoted thereby. *Matter of Rivera*, 109 Misc. 2d 501, 502 (Bronx

Surr. 1981); *Matter of Rugovac*, 77 Misc. 2d 659, 661 (Bronx Surr. 1974). But no New York court has squarely decided the question in a case granting permission to marry. In the present case, Mrs. Moe is said to be available, but Mrs. Coe's whereabouts are unknown. If *Rugovac* and *Rivera* are correct, it would seem that a guardian could be sought to consent to Cristina's marriage. The district court's holding that the Second Circuit's decision with respect to Ms. Moe barred *Pullman* abstention with respect to Ms. Coe, 533 F. Supp. at 626-7 (S.D.N.Y 1981), ignored the factual difference in the circumstances to which the statute was being applied.

Moreover, the first court of appeals panel committed a serious error in refusing to acknowledge the tenability of three alternative constructions of DRL § 15. 635 F.2d at 1048. As the district court had recognized, those readings mandated *Pullman* abstention since they would have deferred construction of an ambiguous statute to the State courts and avoided the need to decide the constitutional issues.

First, it is not clear whether the parent's denial of consent under DRL § 15(2) can be arbitrary or if it must be in the best interests of the child, as must be the grant of consent under DRL § 15(3). The court below held that the best interests standard could not be read in since child custody was not involved and the statute did not mention best interests. 635 F.2d at 1049. But, in fact, the Surrogate in *Rugovac* and *Rivera* held and the Court of Appeals in *Bennett* implied that best interests analysis is applicable. Furthermore, custody *was* involved, for marriage has traditionally involved a change in child custody, once a prop-

erty or chattel transfer from parent or guardian to spouse, now a release from parental custody to self-determination. *See* Katz, "Foster Parents Versus Agencies: A Case Study in the Judicial Application of the 'Best Interests of the Child Doctrine' ", 65 Mich. L. Rev. 145, 151 (1966). Moreover, the best interests standard has been applied where child custody is not involved and where the statute does not refer to best interests. *E.g., Skagen* v. *New York City Employees' Retirement System*, 108 Misc. 2d 448, 497 (N.Y. Co. Sup. 1981); *Matter of Jean C.*, N.Y.L.J. Nov. 25, 1980, p. 13, col. 2 (Queens Fam.), *aff'd*, —— A.D. 2d ——, 447 N.Y.S. 2d 524, N.Y.L.J. Feb. 25, 1982, p. 14, col. 6 (2d. Dep't).

Second, the court below rejected the possibility that the New York courts might read a mature or emancipated minor exception into DRL § 15 on the grounds that children cannot unilaterally emancipate themselves in New York, that New York does not recognize emancipation for youths under sixteen years old, and that emancipation generally applies only where matters of public health and safety are involved. 635 F.2d at 1049. In fact, the New York courts are divided as to whether minors can unilaterally emancipate themselves. *See* cases cited in "Recommendations of the Law Revision Commission to the 1980 Legislature Relating to Support Obligations as Affected by the Independence of Children and by Unconstitutional Sex Distinctions", *1980 McKinney Sess. L.* 1614, 1616-7. Furthermore, it is arguable that the acts of Mrs. Moe and Mrs. Coe were intended to emancipate their children. Moreover, New York courts have afforded children of fifteen adult treatment without a statute. *E.g., Matter of*

Tameeka Charlene W., N.Y.L.J. Sept. 8, 1981, p. 14, col. 6 (Bronx Surr.); *Matter of Rogers*, 36 Misc. 2d 680 (Schuyler Fam. 1962). Finally, the marriage of females of child-bearing age is a public health concern. *Cf., Michael M. v. Superior Court of Sonoma County*, 540 U.S. 464 (1981).

Third, it is arguable that under the circumstances of these cases, a requirement of reasonableness would be read into DRL § 15. The New York Court of Appeals has held that the State's courts will not allow themselves to be used for the furtherance of crime, *Carr v. Hoy*, 2 N.Y.2d 185, 188 (1957), and will refuse to enforce a statute where to do so would permit the commission of a crime affecting the welfare of a child, *Matter of Jacqueline F.*, 47 N.Y.2d 215, 220 (1979). Thus, when enforcement of a statute would further a crime affecting a minor, whether or not the underlying statute is clear, the New York courts may refuse to enforce it. Specifically, in the present case, Ms. Moe's mother allegedly denied her consent to marry in order to continue to collect public assistance for the plaintiff although she had left Mrs. Moe's household. Under New York Social Services Law § 145, collecting or abetting another to collect public assistance in that manner is a crime. Likewise, Mrs. Coe has allegedly failed to insure support, care, and reasonable diligence in supervision for her daughter. Non-support and endangering the welfare of a minor are also crimes. Penal Law §§ 260.05-.10. In order to prosecute these crimes, intent would have to be proven by, in part, reviewing the reasonableness of their acts for withholding consent. Not reviewing the reasons would effectively bar prosecution.

The court below cited *Berger v. Adornato*, 76 Misc. 2d 122 (Onondaga Co. Sup. 1973), in holding that a parent's reasons for withholding consent to marriage were beyond

the scrutiny of New York courts. 635 F.2d at 1048. But the *Berger* court did in fact scrutinize the parents' reasons, just as the *Rugovac* court scrutinized the reasons of the proposed parent-substitute.

Moreover, none of the cases declining to second guess a parent's denial of consent have involved allegations of crime by the parent affecting the child's welfare. Significantly, an improper grant of consent has been found to be a crime and the parent's reasons reviewable. *People* v. *Benn*, 87 Misc. 2d 139, 142-4 (Kings Co. Crim. 1976). Under the circumstances alleged in this case, the New York courts might well decline to become *in particeps crimens*, *cf.*, *Olmstead* v. *United States*, 277 U.S. 438, 471, 484-5 (1928) (*Brandeis*, J., dissenting), and read in a requirement of reasonableness.

Conclusion

For the reasons stated, if a Writ of Certiorari issues on the petition in Docket No. 81-6511, a Writ should issue on this conditional cross-petition.

Dated: New York, New York
May 13, 1982

Respectfully submitted,

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Memorandum Opinion

UNITED STATES DISTRICT COURT

Southern District of New York

80 Civ. 1577

Maria Moe, Raoul Roe, and Ricardo Roe, an infant, by his father Raoul Roe, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

against

David Dinkins, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State, and David Axelrod, individually and as New York State Commissioner of Health,

Defendants.

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CONSTANCE BAKER MOTLEY, D. J.

Defendants have moved for an order, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the complaint. Plaintiffs have moved for an order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, determining that this action may be maintained as a class action with a plaintiff and a defendant class pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. For the reasons stated below, the court concludes that the complaint should be dismissed without prejudice, since abstention is mandatory in this action.

Plaintiffs in this action seek a judgment declaring unconstitutional, and enjoining enforcement of, the parental consent requirements of New York Domestic Relations Law §§ 15.2 & 15.3. Under New York law, all persons who in-

tend to be married in the state of New York must obtain a marriage license from a town or city clerk in the state. N.Y. Dom. Rel. Law § 13. Section 15.2 provides that if it appears that the male applicant for a marriage license is under eighteen years of age and is not under sixteen years of age, or that the female applicant is under the age of eighteen years and is not under fourteen years of age, "then the town or city clerk before he shall issue a license shall require the written consent to the marriage from both parents of the minor or minors or such as shall then be living, or if the parents of both are dead, then the written consent of the guardian or guardians of such minor or minors." Section 15.2 further requires that "[t]he parents, guardians or other persons whose consent it shall be necessary to obtain and file with the town or city clerk before the license shall issue shall personally appear and acknowledge or execute the same before the town or city clerk, or some other officer authorized to administer oaths and take acknowledgments." Section 15.3 provides that if it appears that the female applicant is under the age of sixteen years, the town or city clerk shall require, in addition to the consents provided in Section 15.2, the written approval and consent of a justice of the supreme court or of a judge of the family court. Section 15.3 further provides that any town or city clerk who issues a marriage license without first requiring the approval and consents provided for by Sections 15.2 and 15.3 shall be guilty of a misdemeanor.

Plaintiffs allege that the New York statute requires parental consent to the marriage of minors, in violation of plaintiffs' rights under the First, Fifth, Ninth, and Four-

teenth Amendments to the United States Constitution. In particular, plaintiffs allege that the statute constitutes an absolute veto power over the decision to marry of minors and their prospective spouses, without establishing any standard for the withholding of consent by parents. Plaintiffs allege, moreover, that the statute prevents those minors and their prospective spouses with children from establishing legitimate parent-child relationships through marriage.

Defendants argue that the *Pullman* doctrine of abstention requires dismissal of plaintiffs' complaint. The Second Circuit summarized the standards of the *Pullman* doctrine in *Winters* v. *Lavine*, 574 F.2d 46, 69 (2d Cir. 1978):

> While a litigant wishing to vindicate his federal constitutional rights has a "right to have [those claims] adjudicated by a federal tribunal," *McRedmond* v. *Wilson*, 533 F.2d 757, 760 (2d Cir. 1976), it is equally well-understood that a federal court presented with such claims will under certain circumstances have a duty to postpone consideration of the federal constitutional claims until the state courts have had an opportunity to consider other issues inherent in the lawsuit. The seminal case in the area is *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). "There [, the Supreme] Court held that in special circumstances, where resolution of a federal constitutional issue is controlled by the interpretation of an unclear or complex state statute that is susceptible to a construction which would avoid or modify the necessity of a constitutional adjudication, the federal court should defer to the state court's interpretation of its own statute." *McRedmond* v. *Wilson*, *supra*, 533 F.2d at 760. We have recognized that the significant policies which are advanced by application of the *Pullman* doctrine are "the avoidance of federal-

> state friction, the recognition that regardless of a federal court's construction, the state's highest court is the final expositor of that state's law, and the possibility that the federal [constitutional] question may be avoided." *Id.* at 761. The cases in which application of the *Pullman* doctrine is appropriate are those in which these formidable policy factors "outweigh the duplication of effort and added expense and delay heaped upon the plaintiff by shuttling him between state and federal courts." *Id.* We also explained in *McRedmond* that there are "three essential conditions for invocation of the doctrine of abstention [: (1)] that the state statute be unclear or the issue of state law be uncertain, [(2)] that resolution of the federal issue depend upon the interpretation to be given to the state law, and [(3)] that the state law be susceptible of an interpretation that would avoid or modify the federal constitutional issue." *Id.* (citations omitted).

Accord, Pharmaceutical Society of the State of New York, Inc. v. *Lefkowitz*, 586 F.2d 953, 955-56 (2d Cir. 1978). *See generally Reid* v. *Board of Education*, 453 F.2d 228, 240-42 (2d Cir. 1971). *See also Wright* v. *McMann*, 387 F.2d 519, 525 (2d Cir. 1967) ("it is reasonable to conclude that cases involving vital questions of civil rights are the least likely candidates for abstention").

In the case at hand, the court must first consider whether Sections 15.2 and 15.3 are unclear. Plaintiffs argue that Sections 15.2 and 15.3 are clear and unambiguous, and that under state law the two sections must be read: 1) as failing to provide a standard for the granting or withholding of parental consent, and 2) as providing that the parental consent requirement cannot be dispensed with. Plaintiffs assert that Sections 15.2 and 15.3 have been definitively interpreted in a number of state cases. A close analysis of

the cases relied upon by plaintiffs, however, suggests that these cases are far from "a definitive exposition of state law." *Connecticut State Federation of Teachers* v. *Board of Education Members*, 538 F.2d 471, 485 (2d Cir. 1976).

Thus, for example, in *Carr* v. *Carr*, 104 N.Y.S.2d 269 (Sup. Ct. Chautauqua County 1951), a state court examined the validity of a Michigan marriage by a male of the age of twenty years. In dictum, the court indicated that under Section 15, which then applied to males under twenty-one years of age, the consent of parents was a prerequisite to a valid marriage, if performed in the state of New York. *Id.* at 270, 271. In a more recent case, *Berger* v. *Adornato*, 76 Misc. 2d 122 (Sup. Ct. Onondaga County 1973), a state court held that Section 15.2, as it was then written, violated the Equal Protection Clause of the Fourteenth Amendment because it established a different age standard for marriage between males and females. In ruling the statute unconstitutional as applied to the twenty-old male petitioner, the court characterized Section 15.2 in dicta:

> There are no safeguards, guidelines, limitations or assurances that the parents will perform their responsibility within the framework of the allegedly valid State objective. There is no provision for judicial review, since the authority of the parents is unrestricted and therefore, final.
>
> Thus, the parents may use their authority to act on behalf of the State interest. Or they may do whatever they please. . . .

Id. at 124. Finally, in *In re Powers*, 96 Misc. 2d 183 (Fam. Ct. Yates County 1978), a state Family Court considered a petition seeking the court's review of a parent's refusal to consent, or seeking to dispense with the written parental

consent requirement. The court dismissed the petition on the ground that the Family Court lacked subject matter jurisdiction:

> As to the mother's refusal to give her written consent to license the marriage of her 17-year-old son, even were it shown to be unreasonably withheld or refused, the Family Court has no subject matter jurisdiction to review a parent's refusal or to dispense with the written parental consent required by the statute before a town or city clerk may issue a marriage license to a person under 18 years of age.

Id. at 184.

The court is of the view that these state cases leave Sections 15.2 and 15.3 unclear for a number of reasons. With respect to the *Carr* and *Berger* cases, the state court's discussions of whether the parental consent requirement can be dispensed with and whether a parent's refusal is final and not subject to judicial review were clearly dicta. In both cases the lower state courts were presented with issues which did not require an analysis of possible exceptions or qualifications to the parental consent requirement. With respect to the *Powers* case, it is clear that the Family Court simply found that it lacked subject matter jurisdiction. The *Powers* court carefully refrained from suggesting that other state courts would lack subject matter jurisdiction—that is, the Family Court in *Powers* did not indicate that a parent's refusal was unreviewable by all courts or that Sections 15.2 and 15.3 precluded all courts from dispensing with the written parental consent requirement. *See also Connecticut State Federation of Teachers v. Board of Education Members, supra*, 538 F.2d at 485 (effect of state lower court decisions).

It should be noted, moreover, that the *Carr*, *Berger*, and *Powers* opinions, insofar as they discuss the reviewability of and exceptions to parental consent under Sections 15.2 and 15.3, preceded the Supreme Court's decision in *Bellotti* v. *Baird*, 61 L.Ed 2d 797 (1979). In light of the Court's opinions in *Bellotti*, it is quite possible that a state court would interpret Sections 15.2 and 15.3 differently from the interpretations given in *Carr*, *Berger*, and *Powers*.

In *Bellotti*, Justice Powell concluded, in an opinion joined by three other Justices, that "if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained." *Id.* at 813 [footnote omitted]. The analogy between *Bellotti* and the case at hand is too obvious to be ignored. While the Justice Powell opinion in *Bellotti* at one point does appear to hint at a distinction between marriage and abortion, it cannot be said that *Bellotti's* requirement of an alternative procedure is wholly inapplicable to the case at hand. Accordingly, a state court faced today with the task of interpreting Sections 15.2 and 15.3 might choose, not unreasonably, to interpret these sections as implicitly providing an alternative procedure.

In summary, Sections 15.2 and 15.3 are unclear in a number of respects. The statute may be interpreted by the state courts as implicitly providing a standard for the granting or withholding of parental consent, and as implicitly allowing an alternative procedure for judicial review of a withholding of consent. The statute may also be interpreted as implicitly allowing a court to dispense with the parental consent requirement under certain circumstances. While the language of Sections 15.2 and 15.3

makes no explicit reference to judicial review or dispensation with the consent requirement, the absence of such references will not itself render the sections clear and unambiguous. As discussed above, the state courts which have considered Sections 15.2 and 15.3 have not yet squarely addressed the issues of interpretation presented in the case at hand.

Next, the court must examine whether the resolution of the constitutional issues depends upon the interpretation to be given to the state law. While plaintiffs have raised a number of constitutional theories in their challenge to Sections 15.2 and 15.3, two theories in particular are critical to an analysis of the abstention question. First, a resolution of the constitutional issues would require the court to apply the Supreme Court's decision in *Zablocki* v. *Redhail*, 434 U.S. 374 (1978), to the case at hand. In *Zablocki*, the Court held that when a statutory classification significantly interferes with the exercise of a fundamental right, such as the right to marry, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests. *Id.* at 388. In the case at hand, it is beyond dispute that Sections 15.2 and 15.3 significantly interfere with the exercise of plaintiffs' right to marry. The critical question is, thus, whether these sections are supported by sufficiently important state interests and is closely tailored to effectuate those interests. This inquiry, in turn, depends upon whether Sections 15.2 and 15.3 require parental consent in all instances, and whether a parent's authority to withhold consent is absolute and not subject to judicial review. Obviously, the interpretation to be given Sections 15.2 and 15.3 will effect the court's deter-

mination of whether the provisions are closely tailored to effectuate only sufficiently important state interests.

Second, a resolution of the constitutional issues would require the court to apply the Supreme Court's decisions in *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976), and *Bellotti* v. *Baird*, 61 L.Ed 2d 797 (1979), to the case at hand. In *Danforth*, the Court held that the State may not impose a blanket provision requiring the consent of a parent as a condition for abortion of an unmarried minor during the first twelve weeks of her pregnancy. 428 U.S. at 74. Thus it is inappropriate to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding consent. *Id.* In *Bellotti*, Justice Powell relied upon *Danforth* in concluding that if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained. 61 L.Ed 2d at 813. In such a proceeding a minor is entitled to show that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes. *Id.* at 813-14. "In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the 'absolute, and possibly arbitrary, veto' that was found impermissible in *Danforth*." *Id.* at 814. To the extent, then, that *Danforth* and *Bellotti* may be relevant to the case at hand, the resolution of the constitutional issues depends upon whether Sections 15.2 and 15.3 are interpreted as giving parents an absolute, and possibly arbitrary, veto over a minor's decision to marry.

In short, resolution of both constitutional theories discussed above depends upon the interpretation to be given to Sections 15.2 and 15.3.

Finally, the court must examine whether Sections 15.2 and 15.3 are susceptible of an interpretation that would avoid or modify the federal constitutional issue. The court is of the view that Sections 15.2 and 15.3 are susceptible of an interpretation that would modify the federal constitutional issue. In particular, the court agrees with defendants that the provisions are susceptible to one or more interpretations that would modify the federal constitutional issues. First, Sections 15.2 and 15.3 may be interpreted as implicity providing an exception for minors who have emancipated themselves or who have otherwise shown mature judgment. Such an interpretation would be consistent with "emancipated minor" exceptions in a variety of areas of New York law. *See generally* Report of the Law Revision Commission for 1980, 1980 Leg. Doc. No. 65, at A-42 to A-46. A plausible interpretation of Sections 15.2 and 15.3 is that "emancipated minors" may seek judicial relief from the parental consent requirement. Second, Sections 15.2 and 15.3 may be interpreted as requiring that a parent's granting or withholding of consent be based on the child's best interests. Accordingly, Sections 15.2 and 15.3 may be interpreted as allowing a minor to have a state court review a parent's withholding of consent where the parent's decision is in bad faith or contrary to the child's best interest. In such circumstances, a court could decide, upon consideration of the circumstances and the minor's maturity, to dispense with the parental consent requirement.

Of course, the court expresses no view as to the proper interpretation of Sections 15.2 and 15.3. The court merely

notes that the above interpretations would not be unreasonable or necessarily contrary to the language of the statute. Sections 15.2 and 15.3 have been construed in some respects, but not in those respects critical to this court's constitutional inquiry.

In summary, the court concludes that the three essential conditions for invocation of the doctrine of abstention are met in the case at hand. The policy factors advanced by application of the *Pullman* doctrine here "outweigh the duplication of effort and added expense and delay heaped upon the plaintiff by shuttling him between state and federal courts." *McRedmond* v. *Wilson*, *supra*, 533 F.2d at 761. While New York unfortunately does not have a certification procedure for expedited resolution of these issues of interpretation of New York law, this fact alone does not preclude invocation of the doctrine of abstention. While plaintiffs must bring a state declaratory judgment proceeding or a proceeding under Article 78 of the New York Civil Practice Law and Rules, as well as appropriate appeals if necessary, it may safely be assumed that the state courts will proceed promptly in a case raising such important issues as the case at hand.

Plaintiffs have suggested that they have no state remedies by which to seek an interpretation or review of Sections 15.2 and 15.3. This argument is without support. Plaintiffs may bring a proceeding under Article 78 of the Civil Practice Law and Rules. On applying for a license and being refused, plaintiffs may seek a writ of mandamus under Article 78 against the Clerk of New York City. If the state court finds relief to be appropriate, it may order that a marriage license be issued by the city clerk. *See Berger* v. *Adornato*, *supra*. *See also Friedrich* v. *Katz*, 73

Misc. 2d 663 (Sup. Ct. N.Y. County 1973). While plaintiffs in the case at hand do not intend to challenge the constitutionality of Sections 15.2 and 15.3 in the state courts, it should be noted that under New York law an Article 78 proceeding may not be used to test the constitutionality of a legislative enactment as distinct from the counstitutionality of its application. *Board of Eduction* v. *Gootnick*, 49 N.Y.2d 683 (1980). Should a state court find the case at hand to be inappropriate under Article 78, the matter may be converted to a declaratory judgment action. *See id.* In any case, state remedies are available for plaintiffs to seek an interpretation of Sections 15.2 and 15.3 and, if they so choose, to challenge the constitutionality of the provisions and obtain appropriate relief.

The final issue before the court is the proper disposition of this action, given the court's decision that abstention is appropriate. It is well-established that while a party must inform the state courts what his federal claims are, so that the state statute may be construed "in light of" those claims, a party is not compelled to litigate his federal claims in the state courts. *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 420 (1964). Plaintiffs have informed the court of their intention to preserve their right to litigate their federal claims fully in the federal courts.

As a general rule, it is better practice to retain jurisdiction rather than to dismiss in abstention cases. *Zwicker* v. *Koota*, 389 U.S. 241, 244 n.4 (1967). However, the Supreme Court has made clear that it is not improper to dismiss on grounds of abstention, provided that the dismissal is without prejudice to the right of the plaintiffs to

litigate their federal claims in federal court at the conclusion of the state proceedings. *American Trial Lawyers Assoc. v. New Jersey Supreme Court*, 409 U.S. 467 (1973); *see Yesterday's Children v. Kennedy*, 569 F.2d 431 (7th Cir. 1977), *cert. denied*, 437 U.S. 904 (1978).

In the case at hand, the court is of the view that it is slightly preferable for the court to dismiss the action without prejudice to the right of the plaintiffs to litigate their federal claims in federal court at the conclusion of the state proceedings, rather than retaining jurisdiction. Despite plaintiffs' intention to preserve their right to litigate their federal claims fully in federal court, there is a serious possibility that plaintiffs will receive full relief in the state courts. Accordingly, dismissal without prejudice appears to be the preferable course in terms of judicial economy.

For the reasons stated above, the court concludes that defendants' motions to dismiss the complaint, without prejudice, must be granted. The court reaches this conclusion solely on the grounds of abstention, without considering defendants' other arguments for dismissal. The court need not determine whether this action may be maintained as a class action.

Dated: New York, New York
July 10, 1980

So Ordered.

Constance Baker Motley
U. S. D. J.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ROBERT J. SCHACK , being duly sworn, deposes and says that he is an Asst. Atty. Gen. in the office of the Attorney General of the State of New York, attorney for Respondent Axelrod herein. On the 28th day of May , 1982, he served the annexed upon the following named person :

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel for the
City of New York
Attorney for Respondent
David Dinkins
JUNE A. WITTERSCHEIN
Assistant Corporation Counsel

JANET M. CALVO, ESQ.
Washington Square Legal Services, Inc.
80 Fifth Avenue, Suite 1501
New York, New York 10011
Attorney for Petitioners

Attorneys in the within entitled proceeding By depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorneys at the address es within the State designated by them for that purpose.

Robert J. Schack
ROBERT J. SCHACK

Sworn to before me this
28th day of May , 1982

Assistant Attorney General
of the State of New York

RECEIVED
JUN 2 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 81-6511

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

CHRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Cross-Respondents

v.

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State ,

Defendants

and

DAVID AXELROD, individually and as New York State Commissioner of Health,

Cross-Petitioner.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

CROSS-RESPONDENTS' BRIEF IN OPPOSITION

FRANK A. BRESS
Executive Director
Washington Square Legal Services, Inc.
JANET M. CALVO, of Counsel
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(212) 924-3200

Attorney for Cross-Respondents

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	2
JURISDICTION	3
CONSTITUTIONAL PROVISION AND STATUTES INVOLVED	4
STATEMENT OF THE CASE	4
REASONS WHY THE CROSS PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED	4
POINT I	
THE DETERMINATION TO ALLOW PLAINTIFFS TO PROCEED PSEUDONYMOUSLY IS CONSISTENT WITH COMMON PRACTICE IN THIS AND OTHER FEDERAL COURTS, IS BASED ON THE RELIEF REQUESTED AND THE SPECIFIC PROCEDURAL HISTORY OF THIS CASE AND DOES NOT PRESENT ANY NOVEL ISSUES	4
POINT II	
THE CROSS PETITION CHALLENGING THE CIRCUIT COURT'S DETERMINATION ON THE ISSUE OF ABSTENTION WAS NOT TIMELY FILED AND THE COURT'S ABSTENTION DECISION WAS CONSISTENT WITH SUPREME COURT DECISIONS ON ABSTENTION	9
CONCLUSION	11
APPENDIX	
Order Permitting Commencement and Prosecution of Action Under Pseudonyms dated March 19, 1980	A-1
Pre-trail Schedule Order dated March 13, 1981	A-3
Pre-trial Schedule and Order dated March 27, 1981	A-5

QUESTIONS PRESENTED

1. Should review be granted of rulings below which allowed plaintiffs and intervenors to proceed pseudonymously where they sought an order granting them, not the right to marry, but the opportunity to present evidence of their maturity to marry before an appropriate state official and where the defendant neither made a motion requesting that the plaintiffs' identities be revealed nor initiated any of the discovery methods provided in the Federal Rules of Civil Procedure?

2. Should review be granted of the ruling below denying abstention when the Second Circuit's judgment and decision on abstention were filed over a year before the cross-petition was filed and where the abstention rulings were consistent with this Court's abstention decisions?

Page

OTHER

Fourteenth Amendment, United States Constitution .. 4

28 U.S.C. § 2102(c) 3, 9

Fed. R. Civ. P. 56 7

New York Domestic Relations Law § 15 ..... 1, 4, 5, 9

1973 Op. Atty Gen. 144 10

1964 Op. Atty Gen. 138 10

C. Wright & A. Miller, 10 Federal Practice and Procedure (1973) 7

TABLE OF AUTHORITIES

CASES	Page
Belloti v. Baird, 428 U.S. 132 (1976).....	9, 10
Berger v. Adornato, 76 Misc. 2d 122, 350 N.Y.S.2d 520 (Sup. Ct. 1973)	10
Child v. Beame, 412 F. Supp. 593 (S.D.N.Y. 1976) ...	5
Doe v. Bolton, 410 U.S. 179 (1973)	4-5
Doe v. Deschamps, 64 F.R.D. 652, (D. Mont. 1974) ...	5
Doe v. Lavine, 347 F. Supp. 357 (S.D.N.Y. 1972)	5
H.L. v. Matheson, 450 U.S. 398 (1981)	8
King v. National Industries Inc., 512 F.2d 29 (6th Cir. 1975)	7
Moe v. Dinkins, 635 F.2d 1045 (2d Cir. 1980)	2, 9, 10
Moe v. Dinkins, 533 F. Supp. 623 (S.D.N.Y. 1981) ...	2, 3
MS v. Wermers, 557 F.2d 170 (8th Cir. 1977)	5
Planned Parenthood v. Danforth, 428 U.S.52 (1976) ..	9, 10
Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975)	5
Poe v. Ullman, 367 U.S. 497 (1961)	5
In re Powers, 96 Misc. 2d 183, 408 N.Y.S.2d 761 (Fam. Ct. 1978)	5, 10
Railroad Commission v. Pullman Co., 312 U.S. 496 (1941)	9
Robin Constr. Co. v. United States, 345 F.2d 610 (3d Cir. 1965)	7
Roe v. Ingraham, 364 F. Supp. 536 (S.D.N.Y. 1973) rev'd on other grounds, sub nom Whalen v. Roe, 429 U.S. 589 (1977)	5
Roe v. Wade,, 410 U.S. 113 (1973)	4
Schneider v,. McKesson & Robbin Inc., 254 F.2d 827 (2d Cir. 1958)	7
Southern Rambler Sales Inc. v. American Motors Corp., 375 F.2d 932 (5th Cir.)	7
Warth v. Seldin, 522 U.S. 490 (1975)	8
Wisconsin v. Constantineau, 400 U.S. 433 (1971)	9
Zwickler v. Koota, 389 U.S. 241 (1977).....	9

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

CHRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Cross-Respondents

v.

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State,

Defendants

and

DAVID AXELROD, individually and as New York State Commissioner of Health,

Cross-Petitioner.

Cross-Respondents' Brief In Opposition to Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Petitioners, Cross-Respondents Cristina Coe and Pedro Doe respectfully pray that this Court issue a Writ of Certiorari to review that part of the judgment and opinion of the United States Court of Appeals for the Second Circuit filed on January 11, 1982, which upheld the constitutionality of New York Domestic Relations Law § 15 and denied plaintiffs motion for summary judgment, but deny the cross-petition to review that part of the judgment which allowed plaintiffs and plaintiffs-intervenors to proceed pseudonymously and the judgment and opinion of the United States Court of Appeals for the Second Circuit filed on December 19, 1980 which held absention unwarranted.

OPINIONS BELOW

On March 19, 1980 the Honorable Morris J. Lasker, District Judge, United States Court for the Southern District of New York, granted an ex parte order permitting Maria Moe, Raoul and Ricardo Doe to commence and prosecute their case in forma pauperis and under pseudonyms. (See Appendix, p. A-1.) The complaint was filed the same day. The case was assigned to the Honorable Constance Baker Motley.

In a decision dated July 10, 1980 (Appendix to cross-petition) the district court dismissed the complaint on the ground of abstention. In a judgment and decision dated December 9, 1980 (Appendix D to petition) the United States Court of Appeals for the Second Circuit reversed. Moe v. Dinkins, 635 F.2d 1045 (1980). The Second Circuit found that the statute was "clear," no ambiguous words or phrases existed, the parties concurred on the import and application of every material term and that the State's suggestions of ambiguity were "remote, implausible" and did not justify abstention. Moe v. Dinkins, 635, F.2d 1048, 1050 (Appendix D to petition, pp. D.4, D-6).

On remand, the district court certified a plaintiff class in an order and decision dated June 29, 1981 (Appendix C to petition) (unpublished). The district court granted the motion of Cristina Coe and Pedro Doe to intervene as plaintiffs and additional class representatives and to proceed pseudonymously in an order and decision dated August 17, 1981 (Appendix "B" to petition) Moe v. Dinkins, 533 F. Supp 623 (1981). The court also denied plaintiffs motion for summary judgment and granted summary judgment for defendants. The court rejected defendant's objection that the true names of plaintiffs and plaintiffs-intervenors (hereafter jointly referred to as plaintiffs) had not been revealed to the defendant. The court stated that it was common for plaintiffs to be permitted to proceed under pseudonyms in cases which concerned issues of a highly sensitive and personal nature such as marriage and illegitimacy.

The court held that the plaintiffs had alleged facts sufficient to demonstrate that they had the personal stake in the outcome of the controversy needed to confer standing and that the facts which the defendant disputed were not material to the constitutional question presented or to the relief plaintiffs requested. The court further pointed out that the plaintiffs did not seek an order mandating their marriage, but only a determination that they were entitled to an opportunity to present to the appropriate state official facts relevant to a determination of whether a marriage license should issue. Moe v. Dinkins, 533 F. Supp at 627. (Appendix B to petition p. B-10).

The court also rejected the defendant's attempts to relitigate the issue of abstention. The court found that the defendant's contention that the challenged statute was ambiguous and could be interpreted to allow of the appointment of a guardian who could consent to plaintiffs' marriage was controlled by and contrary to the prior Court of Appeals ruling in December, 1980. Moe v. Dinkins, 533 F. Supp at 627 (Appendix B to petition, p. B-8). On August 24, 1981 the district court ordered the sealing of the intervenor complaint and affidavits which contained the true names of Cristina Coe and Pedro Doe.

The United States Court of Appeals for the Second Circuit affirmed the decision of the district court in an opinion and order filed January 11, 1982 (Appendix A to the petition) (unpublished).

JURISDICTION

This Court does not have jurisdiction of cross-petitioner's writ to review the lower court's abstention decision. The judgment and opinion of the United States Court of Appeals for the Second Circuit on the issue of abstention was filed on December 19, 1980. The defendant's cross-petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit was not filed within ninety days of that date as required by 28 U.S.C. § 2101(c). The cross-petition was not filed until May 13, 1982.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The constitutional provision and statute relevant to the issues raised in the cross-petition are the Fourteenth Amendment to the United States Constitution and New York Domestic Relations Law § 15 (McKinney 1977).

STATEMENT OF THE CASE

The cross-petitioner's statement of the case regarding Cristina Coe and Pedro Doe contains errors. Petitioner refers this court to the statement of the case in the petition for a correct rendition of the facts. The defendant's statement of the case regarding Maria Moe, Raoul Ricardo Roe also contains errors. Maria, Raoul and Ricardo did not join in the petition. However, the facts relevant to the issues raised in the cross-petition are related in section below entitled, Reasons Why the Cross-Petition for a Writ of Certiorari Should be Denied.

REASONS WHY THE CROSS-PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

POINT I

THE DETERMINATION TO ALLOW PLAINTIFFS TO PROCEED PSEUDONYMOUSLY IS CONSISTENT WITH COMMON PRACTICE IN THIS AND LOWER FEDERAL COURTS, WAS BASED ON THE RELIEF REQUESTED AND THE SPECIFIC PROCEDURAL HISTORY OF THIS CASE AND DOES NOT PRESENT ANY NOVEL ISSUES.

The lower courts' determinations to allow plaintiffs to proceed pseudonymously were routine and typical. Commencement and prosecution of an action by plaintiffs under pseudonyms is a common and well accepted practice, particularly in cases which, like this one, involve issues of a sensitive and highly personal nature. See e.g. Roe v. Wade, 410 U.S. 113 (1973); Doe v.

Bolton, 410 U.S 179 (1973) (challenges to prohibition of abortion); Poe v. Ullman, 367 U.S. 497 (1961) (challenge to ban on contraceptives) MS. v. Wermers 557 F.2d 170 (8th Cir. 1977) (challenge to parental consent for minors to receive contraceptives; Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975); (challenge to requirement of parental consent for minors to obtain an abortion); Child v. Beame, 412 F. Supp. 593 (S.D.N.Y. 1976) (minors suit against foster care agencies for failure to place them); Doe v. Des Champs, 64 F.R.D. 652 (D. Mont. 1974) (challenge to abortion statute); Roe v. Ingraham, 364 F. Supp. 536 (S.D.N.Y. 1973); rev'd on other grounds, sub nom. Whalen v. Roe, 429 U.S. 589 (1977) (challenge to requirement that physicians file prescription forms containing identity of patients receiving prescriptions for certain drugs); Doe v. Lavine, 347 F. Supp. 357 (S.D.N.Y. 1972) (challenge to requirement to identify putative fathers of illegitimate children).

Moreover, the courts' determinations to allow plaintiffs to proceed pseudonymously were consistent with New York State policy to preserve the privacy of minors seeking to marry. New York Domestic Relations Law § 15.3 (McKinney 1977) provides for the sealing of all papers and records pertaining to the application for judicial approval of a minor's marriage. See In re Power and Burns, 96 Misc.2d 182, 408 N.Y.S.2d 761, unnumbered footnote (Family Ct. Yates Co. 1978) in which the court noted that Powers and Burns were fictitous names for minor plaintiffs seeking judicial approval of the issuance to them of a marriage license.

Although neither the Federal Rules of Civil Procedure nor the local rules of the United States District Court for the Southern District contain rules regarding proceeding under pseudonyms, the Southern District clerk's office has established a routine procedure which was followed in this case. Before

filing the case, the plaintiffs submitted to the court clerk, a complaint containing pseudonyms, a complaint containing true names, an ex parte application to proceed under pseudonyms accompanied by two sets of affidavits, one set with pseudonyms, one set with true names, a memorandum of law and a proposed order. These papers were taken before a district court judge and after review he signed an order granting plaintiffs permission to proceed pseudonymously and ordering the sealing of the complaint and affidavits containing true names, to be unsealed only upon court order. (See Appendix p. A-1 - A-2.) The court clerk then sealed in an envelope the complaint and affidavits containing true names and filed in the public court files the complaint and affidavits containing pseudonyms, the application, memorandum and order.

The cross-petition here bases his petition on the ground that the plaintiffs true names were never revealed to him. Yet he never made a motion for such relief nor used any of the discovery methods provided by the Federal Rules of Civil Procedure.* If he had done so the plaintiffs would have had the opportunity to present their concerns to the court and request an order which protected the plaintiffs against possible harrassment, ensured that the information disclosed would be kept confidential and prevented unnecessary investigation of neighbors and employers, which would have resulted in increased stigmatization of the couples and and their children because of their illegitimate status.

---

* On April 23, 1980 defendant filed a motion to dismiss on abstention and other grounds in the district court. In support of his motion defendant's affidavit stated that he wanted the name of Maria Moe's mother so that he could refer the mother to appropriate authorities for investigation. In his reply brief he stated that should the case continue he would require plaintiffs' identities in order to investigate their claims. On May 5, 1980 plaintiffs moved for class certification. On July 17, 1980 the district court granted the defendant's motion to dismiss on the grounds of abstention but made no determination on the defendant's other motions or plaintiffs' motion for class certification. In December 1980, the Second Circuit reversed the district court's abstention decision and remanded the case to the district court. On March 13, 1981, the district judge held a conference to discuss with

(Footnote continued)

The cross-petitioner's unprecedented position is that he had the right to be gratuitously informed of the identity of the plaintiffs and allowed to do whatever he wanted with the information, without having to make a motion or initiate any discovery or present support for his request to a court and without allowing the plaintiffs to have the court hear their concerns.*

(Footnote continued from previous page)

the parties what issues were outstanding and how the case would proceed. The district court scheduled the defendants' outstanding motion and plaintiffs' motion for class certification to be heard on March 27, 1981. (See Judge Motley's Pretrial Schedule and Order, attached in Appendix, p. A-3.) The defendants did not mention any objection to the plaintiffs proceeding pseudonymously and specifically did not state they could not defend against plaintiffs' class certification motion without the true names of plaintiffs. On March 27, 1981 the district court heard and determined defendants' and plaintiffs' motions and discussed further scheduling. Plaintiffs informed the court and the defendant that they intended to move for summary judgment. (See Judge Motley's Pretrial Schedule and Order, attached as Appendix, p. A-5.) Again the defendants did not mention any objection to the plaintiffs' proceeding pseudonymously. The parties appeared again before Judge Motley on April 24, 1981. The defendants did not mention any objection to plaintiffs proceeding pseudonymously at this time. On May 8, 1981 plaintiffs filed a motion for intervention and summary judgment. The defendant opposed these motions in part because the true names of plaintiffs had not been revealed to him. Defendant's affidavit in support of his opposition stated that he had considered deposing plaintiffs pseudonymously but had decided not to. Even at this late date plaintiffs' counsel offered to allow defendant's counsel to meet with plaintiffs and plaintiffs' counsel. The state defendant's counsel rejected this offer and insisted on full disclosure with unlimited use of the information.

* The cross-petitioners position is contrary to well-settled proposition that in order for a defendant to oppose a plaintiff's motion for summary judgment because he lacks information, he must have taken advantage of available discovery methods and that Fed. R. Civ. P. 56(f) will not be applied to aid nondiligent defendants who have failed to make use of the various discovery devices that were at their disposal. See 10 C. Wright and A. Miller, Federal Practice and Procedure § 2740 at 726 (1973). King v. National Industries, Inc., 512 F.2d 29 (6th Cir. 1975); Southern Rambler Sales, Inc. v. American Motors Corp., 375 F.2d 932 (5th Cir.), cert. denied, 389 U.S. 832 (1967); Robin Constr. Co. v. United States, 345 F.2d 610 (3d Cir. 1965); Schneider v. McKesson & Robbins, Inc., 254 F.2d 827 (2d Cir. 1958).

Further, the facts which the cross-petitioner-defendant contends he needs petitioners' identities to dispute are not material to the constitutional question presented or the relief requested by the petitioners. The petitioners do not claim that they have an absolute right to marry. They only claim that they have, like minors who lie or circumvent New York State's laws, a procedural due process right to a hearing and deter mination by an appropriate state official of their capacity to marry. They alleged facts in their complaint and their other affidavits* sufficient to demonstrate that they had a stake in the outcome of the case. Warth v. Seldin, 422 U.S. 490, 498, 501 (1975). See H.L. v. Matheson, 450 U.S. 398 (1981). Specifically, Cristina and Pedro alleged that Cristina's mother had attempted to force her to have an abortion, refused to allow her to marry, and thereafter refused to have anything to do with Cristina, but Cristina and Pedro were about to become parents, that they were living together and supporting themselves, that they jointly had sought social work counselling, pre-natal care and parenting training in order to prepare for child birth, and child care, and their life together and that they wished to marry to legitimate their relationship and their child. It would have been inappropriate for the district court to determine whether these allegations were true and constituted sufficient evidence to demonstrate capacity to marry. To do so would have usurped the proper role of the state forum. Petitioners seek only the opportunity to present the facts of their situation for evaluation of their capacity to marry by an appropriate state official.

---

* Cristina and Pedro's motions were supported by their affidavits and affidavits of a social worker and nurse midwife who had counselled them.

POINT II

THE CROSS PETITION CHALLENGING THE CIRCUIT COURT'S DETERMINATION ON THE ISSUE OF ABSTENTION WAS NOT TIMELY FILED AND THE LOWER COURTS' ABSTENTION DECISIONS WERE CONSISTENT WITH SUPREME COURT DECISIONS ON ABSTENTION.

The cross petition was filed on May 17, 1980 more than ninety days after the Second Circuit's opinion and judgment on the issue of abstention dated December 9, 1980. The cross petition is therefore not timely filed. 28 U.S.C. § 2101(c).

Further the decision of the Second Circuit, and the decision of the district court applying the Second Circuit's decision were consistent with this court's abstention decision. The legal standard for federal judicial abstention has been considered by this court many times and the standard is clear. When a state law is challenged on federal constitutional grounds, the federal court will abstain if the state statute is ambiguous and therefore susceptible to more than one interpretation and if one of the interpretations would save or modify the constitutional issue. Wisconsin v. Constantineau, 400 U.S. 433 (1971); Zwickler v. Koota, 389 U.S. 241 (1967); Railroad Commission v. Pullman Co., 312 U.S. 496 (1941) see Moe v. Dinkins, 635 F.2d 1047-1048 (Appendix D to Petition p. D-3 - D-4). Compare Belloti v. Baird, 428 U.S. 132 (1976) and Planned Parenthood v. Danforth, 428 U.S. 52 (1976) decided by this court on the same day. Both cases challenged state statutes which required parental consent for a minor's abortion. The Danforth statute was similar to New York Domestic Relations Law § 15. It provided that "No abortion shall be performed . . . except with the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years...." Planned Parenthood v. Danforth, 408 U.S. at 85. The Bellotti statute provided that if the parents refused consent, a court could override that refusal "for good cause shown."

Bellotti v. Baird, 428 U.S. at 134-135. This court abstained in Bellotti to allow the state court to interpret the good cause term in the statute, but did not abstain in Danforth.

Much as the petitioners and cross-petitioners might wish otherwise New York Domestic Relations Law § 15 is not ambiguous. It clearly mandates that, before they can marry, law abiding minors must have parental consent which has been personally acknowledged in writing before a designated state official. Parental consent is required regardless of the circumstances. The parent need not live with, support, care for or have any contact with the minor wishing to marry. The parent whose consent is required may even be insane and therefore unable to give reasoned consent. Moe v. Dinkins, 635 F.2d 1049 (Appendix D to petition, p. D-5) 1964 Op. Atty. Gen. 138. The minor wishing to marry may be pregnant or a parent with responsibility for an infant child or a mature and fully emancipated person. Moe v. Dinkins, 635 F.2d 1049 (Appendix D to petition, p. D-5); Berger v. Adornato, 76 Misc.2d 122, 350 N.Y.S.2d 520 (Sup. Ct., 1973). Parental consent may be withheld for any arbitrary reason or no reason at all. Moe v. Dinkins, 635 F.2d 1048 (Appendix D to petition, p. D-4); In re Powers, 96 Misc. 2d 183, 408 N.Y.S.2d 761 (Fam. Ct. 1978).

On behalf of the cross-petitioner, the New York State Attorney General's main claim is that a state court could appoint a guardian for the purpose of consenting to a minor's marriage. Not only is this position belied by the plain wording of the statute, it is ironic and inconsistent. Part of the authority relied on by courts interpreting New York Domestic Relations Law §15 is an official opinion of the New York State Attorney General which states that the consent of a court-appointed guardian cannot bypass Section 15's requirement of parental consent. 1973 Op. Atty. Gen. 144.

CONCLUSION

For the reasons stated above, the cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK A. BRESS, ESQ.
Washington Square Legal
Services, Inc.
JANET M. CALVO, Of Counsel
80 Fifth Avenue, Suite 1501
New York, New York 10011
(212) 924-3200

Attorneys for Petitioners

Tasher J.

80 CIV 1572

U.S. DISTRICT COURT
FILED
MAR 19 1980
S.D. OF N.Y.

JUDGE MOTLEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARIA MOE, RAOUL ROE, and RICARDO ROE, an infant, by his father RAOUL ROE, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

-against-

DAVID DINKINS, individually, and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State, and DAVID AXELROD, individually, and as New York State Commissioner of Health,

Defendants.

CIVIL ACTION NO.

EX PARTE ORDER PERMITTING COMMENCEMENT AND PROSECUTION OF THIS ACTION IN FORMA PAUPERIS, UNDER PSEUDONYMS, WITHOUT THE APPOINTMENT OF A GUARDIAN AD LITEM, FOR THE SEALING OF CERTAIN DOCUMENTS AND THE FILING OF A COMPLAINT WITH PSEUDONYMS

Upon the Plaintiffs' ex parte motion for leave to commence and prosecute this action (1) in forma pauperis, (2) under pseudonyms, (3) without the appointment of a guardian ad litem, and (4) for the sealing of certain documents and the filing of a complaint with pseudonyms, the supporting affidavits of Janet Calvo, Maria Moe and Raoul Roe, and upon all of the papers herein, it is hereby

ORDERED that Plaintiffs' ex parte motion for leave to commence and prosecute this action (1) in forma pauperis, (2) under pseudonyms, (3) without the appointment of a guardian ad litem be granted.

The named plaintiffs' affidavits and a complaint setting forth the plaintiffs' true names have been examined by this court and it is ordered that they be sealed by the Clerk of the Court and not opened by anyone without court order. It is ordered that a complaint with pseudonyms be filed.

DATED: New York, New York
MARCH 19 1980.

UNITED STATES DISTRICT JUDGE

(PART ONE)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MAR 16 1981
S.D. OF N.Y.

Mac, Maria

Plaintiff(s), 80 CIV. 1577 (CBM)

-against-

Dunkins

PRE-TRIAL SCHEDULE AND ORDER

Defendant(s).

On _____ counsel for the defendant plaintiff _____, was notified by telephone to appear for a pre-trial conference in Room _____ on _____ at _____ M. Counsel was further told that the conference should be attended by an attorney thoroughly familiar with the facts of the case and that counsel should appraise all the other parties of this information.

All parties having appeared for a pre-trial conference on this day (with exceptions as noted), it is ORDERED that:

1. All discovery shall be concluded by all parties no later than _____.

2. Each party's pre-trial memorandum and proposed pre-trial ordered shall be due _____. A joint pre-trial order may be submitted if the parties can agree.

3. The next pre-trial conference shall be held in Room _____ on _____ at _____ M.

4. (Further orders, if any.)

80 Civ. 4711 (CBM)

Further orders, if any, continued:

The motion to dismiss and for class certification will be heard on March 25 at 3:00 P.m.

The city defendant is directed to serve and file an answer by 3/20/81

5. ALL PARTIES ARE INSTRUCTED TO THOROUGHLY FAMILIARIZE THEMSELVES WITH THIS COURT'S "Memorandum to All Attorneys."

Copies are available in Chambers or will be supplied upon receipt of a stamped, self-addressed envelope.

Dated: New York, New York

3/13 19 81

SO ORDERED,

Charles L. Brieant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

Moe

Plaintiff(s). 80 CIV. 1577 (CBM)

-against-

Dinkins

PRE-TRIAL SCHEDULE AND ORDER

Defendant(s).

----------x

On _____ counsel for the defendant plaintiff, _____, was notified by telephone to appear for a pre-trial conference in Room ____ on _____ at _____ M. Counsel was further told that the conference should be attended by an attorney thoroughly familiar with the facts of the case and that counsel should appraise all the other parties of this information.

All parties having appeared for a pre-trial conference on this day (with exceptions as noted), it is ORDERED that:

1. All discovery shall be concluded by all parties no later than _____.

2. Each party's pre-trial memorandum and proposed pre-trial ordered shall be due _____. A joint pre-trial order may be submitted if the parties can agree.

3. The next pre-trial conference shall be held in Room 906 on April 24, 198 at 2:00 P. M.

4. (Further orders, if any.)

81 Civ 1577 (CBM)

Further orders, if any, continued:

Mot. in to dismiss for lack of subject matter jurisdict. is denied as to defendant Sabine. Mot. in to certify plaintiff and defendant classes granted. Mot. in to dismiss of defendant Axelrod denied. Opinion on to be filed by court. Parties directed to brief motion to classes since. Plaintiffs brief due April 10, 1981. Defendant's brief due April 17, 1981. Plaintiffs response due April 27, 1981.

5. ALL PARTIES ARE INSTRUCTED TO THOROUGHLY FAMILIARIZE THEMSELVES WITH THIS COURT'S "Memorandum to All Attorneys."

Copies are available in Chambers or will be supplied upon receipt of a stamped, self-addressed envelope.

Dated: New York, New York
3/27 1981

SO ORDERED.

Charles B. D. J.

ORIGINAL

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SUPREME COURT, U.S.

No. 81-6511

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

CHRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Petitioners

v.

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State, and DAVID AXELROD, individually and as New York State Commissioner of Health,

Respondents.

Reply Brief in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

FRANK A. BRESS
Executive Director
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Attorney for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

POINT I

THE PETITION SHOULD BE GRANTED BECAUSE IT RAISES IMPORTANT ISSUES OF FEDERAL LAW WHICH WERE PROPERLY RAISED IN THE COURT BELOW 2

POINT II

THIS COURT SHOULD GRANT THE PETITION TO CONSIDER THE QUESTION OF WHETHER THE CLASS SHOULD INCLUDE ILLEGITIMATE CHILDREN WHOSE MINOR PARENTS HAVE BEEN DENIED ANY OPPORTUNITY TO DEMONSTRATE THEIR CAPACITY TO MARRY 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES — **Page**

Allerton v. Allerton, 104 Misc. 627, 172 N.Y.S. 152 (Sup. Ct., Wayne Co. 1918) 6

Anonymous v. Anonymous, 176 Misc. 850, 29 N.Y.S.2d 331 (Fam. Ct., N.Y. Co. 1941) 6

Armstrong v. Manzo, 380 U.S. 545 (1965) 5

Bellotti v. Baird, 443 U.S. 622 (1979) 2

Brown v. Brown, 51 Misc. 839, 274 N.Y.S.2d 484 (Fam. Ct., N.Y. Co. 1966) 6

Carey v. Population Services International, 431 U.S. 678 (1977) 4

Cuyler v. Sullivan, 446 U.S. 335 (1980) 8

Doe v. Lavine, 347 F. Supp. 357 (S.D.N.Y., 1972) 9

Eisenstadt v. Baird, 465 U.S. 438 (1972) 4

Jennings Oil Co., Inc. v. Mobil Oil Corp., 80 F.R.D. 124 (S.D.N.Y. 1973) 9

Leisner v. New York Telephone Co., 358 F. Supp. 359 (S.D.N.Y. 1973) 9

Magee v. Nealson, 108 Misc. 396, 177 N.Y.S. 517 (Sup. Ct., Steuben Co. 1919) 6

Matturro v. Matturro, 281 A.D. 695, 117 N.Y.S.2d 523 (2d Dept. 1952) 6

Matturro v. Matturro, 111 N.Y.S.2d 533 (Sup. Ct., Westchester Co. 1952) 6

Mendoza v. Lavine, 72 F.R.D. 520 (S.D.N.Y. 1976) 9

Parham v. J.R., 442 U.S. 584 (1979) 3

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 2,4

Short v. Hotaling, 32 Misc.2d 933, 225 N.Y.S.2d 53 (Sup. Ct. Kings Co. 1962) 6

Smith v. Organization of Foster Families, 431 U.S. 816 (1977) 5

Trimble v. Gordon, 430 U.S. 762 (1977) 2

TABLE OF AUTHORITIES

CASES	Page
Vance v. Tenazas, 444 U.S. 252 (1980)	7,8
Wisconsin v. Yoder, 406 U.S. 205 (1972)	3
Woe v. Matthews, 408 F. Supp. 419 (E.D.N.Y.) aff'd 512 F.2d 40 (2d Cir. 1977)	9
Youakim v. Miller, 425 U.S. 231 (1976)	7
UNITED STATES CONSTITUTION	
Article III, Sec. 2	2
First Amendment	5
Fifth Amendment	5
Ninth Amendment	5
Fourteenth Amendment	5
FEDERAL STATUTES	
Fed. R. Civ. Pro. 17(c)	10
Fed. R. Civ. Pro. 23(a)	10
Fed. R. Civ. Pro. 23(b)(2)	10
NEW YORK STATE STATUTES	
N.Y. Dom. Rel. Law §7 (McKinney 1977)	6
N.Y. Dom. Rel. Law §24 (McKinney 1977)	8
OTHER	
Human Resources Administration, "Report of the HRA Ad Hoc Interagency Task Force on Adolescent Pregnancy (December 1979)	4
U.S. Department of Health Education and Welfare, Report on Services to AFDC Families, 92nd Cong., 1st Sess., pp. 33-35 (Comm. Print 1971)	3

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v.

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State, and DAVID AXELROD, individually and as New York State Commissioner of Health,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Cristina Coe and Pedro Doe respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit filed on January 11, 1982.

POINT I

THE PETITION SHOULD BE GRANTED BECAUSE IT RAISES IMPORTANT ISSUES OF FEDERAL LAW WHICH WERE PROPERLY RAISED IN THE COURT BELOW.

On the merits, the respondent's base their contention that this court should not grant Cristina and Pedro's petition on a statement in the case of Bellotti v. Baird, 443 U.S. 622, 637 (1979). The existence of such a statement is all the more reason for this court to grant the petition. Such a statement in a case is not made after full consideration of legal issues in the context of the factual situation of real people. The existence of a statement which prejudges a situation not fully presented to the court, violates the basic principle that a court should make a determination only when confronted with a real case or controversy. United States Constitution, Article III, Sec. 2.

The issue of the options constitutionally available to minors confronted with pregnancy and the responsibility for an infant are too important for the numerous individuals affected and this society as a whole to be resolved by anything less than full consideration by this court. Pregnancy and child bearing before an artificially designated age of majority is, always has been, and always will be a biological and social fact of life. This court has determined that minors have a constitutional right to choose abortion without parental notification or consent if they can demonstrate maturity or that their best interests would be served. Bellotti v. Baird, 443 U.S. 622 (1979); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976). The alternative to abortion now available to minors like Cristina and Pedro is to bear illegitimate children. Illegitimate status heaps a myriad of social and legal disabilitites upon both children and parents and imposes burdens on society as well. See Petition, pp. 9-12; Trimble v Gordon, 430 U.S. 762, 768-70 (1977); Weber v. Aetna Casualty and Surety Co.,

406 U.S. 164, 175-76 (1972); see U.S. Dept. of Health Education and Welfare, 92nd Cong., 1st Sess., Report on Services to AFDC Families 33-35 (Comm. Print 1971) in which the Department of Health Education and Welfare reported to Congress that illegitimate births contributed substantially to the size of the Aid to Families with Dependent Children program and that about half of all illegitimate births were to mothers under twenty years of age. Petitioners assert that this court should fully consider the availability of the option proposed by Cristina and Pedro and others like them; a chance to demonstrate the capacity for establishment of a legally sanctioned, traditional two parent family, marriage, self support and legitimacy.

The respondent attempts to justify denial of such an opportunity by arguing that a state may defer to parental control over children. Minors are not the property of their parents. Their lives are not subject to unlimited parental whim. Parental decisions which will jeopardize the well being of a minor or have a potential for significant social burdens are subject to limitation. Wisconsin v. Yoder, 406 U.S. 205, 233-34 (1972). See Parham v. J.R., 442 U.S. 584, 602, 606-607 in which this court denied parents "absolute and unreviewable discretion" and held that inquiry by a "neutral factfinder" was constitutionally required.

While advocating parental authority, the respondent ignores the fact that Cristina and Pedro are parents too, with responsibilities for the well being of an infant and that Pedro's mother and father who desired and consented to the marriage are also parents. This court has not resolved or given guidance on an issue, which the biological and social facts of life dictate must be decided; how should the interests of minor parents responsible for the care of an infant be balanced with the interests of the parents of those minors. This is a particularly important issue in this case since New York State disregards the interests and desires of other parents involved

and affords a one parent veto even to a parent who is insane or who, like Cristina's mother, refuses to live with, support or have any contact with her daughter.

Cristina and Pedro's plight is not an isolated or infrequent one. The district court below pointed out that in one year, in New York City alone, there were 32,000 pregnancies and over 10,000 out of wedlock births to women between fifteen and nineteen (Decision dated June 29, 1981, attached to Petition, Appendix C p. C-11). See Human Resources Administration, "Report of the HRA Ad Hoc Interagency Task Force on Adolescent Pregnancy" (December 1979). This court has recognized that the very existence of a pregnancy can fracture family structure and that parental authority is not enhanced by imposing parental veto power when the minor and the parent are fundamentally in conflict about what to do when confronted with the minor's pregnancy. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 75 (1976).

Cristina's situation presents the alternative to that presented in Planned Parenthood. Cristina's mother attempted to force her daughter to have an abortion over Cristina's strong objections and refused to give consent to marriage and legitimation of Cristina's child. Allowing the imposition of forced illegitimacy as a punishment for pregnancy or refusal to abort is just as perverse and irrational as imposing pregnancy as a punishment for fornication. See Carey v. Population Services International, 431 U.S. 678 (1977); Eisenstadt v. Baird, 465 U.S. 438 (1972).

Cristina and Pedro, as parents, do not assert that they should have predominance over the interests of their parents; they do not insist on an absolute right to marry. They assert only that as persons of an age at which New York State allows marriage, they have a right to be heard. They do not assert, as did the minors seeking abortion, that they only, and not their parents, should be heard. They ask only what New York affords those minors who circumvent its laws to marry;

a hearing before a neutral factfinder at which they and their parents have an opportunity to be heard on the issue of their capacity to marry and legitimate their child. Fundamental fairness will thus be guaranteed to the minor parents and their parents since procedural protections can be afforded to one party without derogating the substantive liberty of another. Smith v. Organization of Foster Families, 431 U.S. 816, 846 (1977); see Armstrong v. Manzo, 380 U.S. 545 (1965).

Petitioners as plaintiffs below consistently raised the issue that their Fourteenth Amendment rights to due process and equal protection were violated by New York state law in that they were denied any opportunity to present evidence of their capacity to marry and legitimate their children in an appropriate state forum. The district court clearly recognized that this was a primary issue* raised by plaintiffs. The district court stated

> Plaintiffs do not seek an order mandating their marriage. They seek only a determination that the parental consent requirement is unconstitutional so that they may present to the appropriate official the facts relevant to a determination of whether a marriage license should issue. (Opinion dated August 18, 1981, Appendix B to Petition, p. B-10.)

The Second Circuit's per curiam opinion also pointed out that the plaintiffs asserted "a deprivation of liberty guaranteed by the Due Process Clause of the Fourteenth Amendment ..." (Opinion dated January 11, 1982, Appendix A to Petition, p. A-4.) Contrary to the respondents' assertion, Cristina and Pedro argued to the Court of Appeals in both their main and reply briefs that under New York State law marriages of persons between fourteen and eighteen were not void and that New York State courts were charged with the responsibility of determining

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* Plaintiffs contended that their rights under the First, Fifth and Ninth Amendments to marry, legitimate their children and rear their children as they saw fit in a legally and socially sanctioned traditional two parent family are infringed. Further, their children's concomittant right to be legitimate and reared in a traditional family setting are violated. Also the rights of those parents who wished the minors to marry are thwarted by the one parent veto imposed by New York Domestic Relations Law.

the validity of the marriage of a minor who had circumvented New York law to marry and that the courts applied a maturity standard to such a determination. (Plaintiffs-Appellants Brief to the Second Circuit p. 35, Plaintiffs-Appellants Reply Brief to the Second Circuit pp. 6-7, 12-13, 19.) The statutes and cases cited were the same as those cited in the petition. Matturro v. Matturro, 281 A.D. 695, 117 N.Y.S.2d 523 (2d Dept. 1952); Brown v. Brown, 51 Misc.2d 839, 274 N.Y.S.2d 484 (Fam. Ct. N.Y. Co. 1966); Short v. Hotaling, 32 Misc.2d 933, 225 N.Y.S.2d 53 (Sup. Ct., Kings Co. 1962); Matturro v. Matturro, 111 N.Y.S.2d 533 (Sup. Ct., Westchester Co. 1952); Anonymous v. Anonymous, 176 Misc. 850, 29 N.Y.S.2d 331 (Fam. Ct., N.Y. Co. 1941); Magee v. Nealson, 108 Misc. 396, 177 N.Y.S. 517 (Sup. Ct., Steuben Co. 1919); Allerton v. Allerton, 104 Misc. 627, 172 N.Y.S. 152 (Sup. Ct., Wayne Co. 1918).

These cases clearly demonstrate that minors who circumvent New York law to marry by lying, running away to another state, etc. are afforded a hearing on their capacity to marry if their marriage is challenged. If a minor's circumvention of the law amounts to perjury, in the unlikely event s/he is prosecuted, the minor is given a separate hearing to determine criminal liability. The validity of the marriage is not affected and is given legal sanction and recognition by the State of New York. See cases above and N.Y. Domestic Relations Law §7.

From the inception of this case, petitioners pursued the claims of denial of due process and equal protection and requested the relief of a hearing at which they could present evidence to demonstrate their capacity to marry. In the question presented in their petition for certiorari, petitioners attempted to succinctly set forth their claims while including its terms and circumstances in as much detail as possible. Therefore, included in the question was the actual circumstance of New York law which had been argued to the court below, that minors who circumvent New York law to marry are afforded a

hearing on their capacity to marry. That this circumstance was included in the question does not change the basic due process and equal protection claim. Rather, it amplifies the egregious nature of the state's denial to minor law abiding parents like Cristina and Pedro of any opportunity to prove their capacity to marry.* Even if the petitioners had not pointed out to the court below or in their petition to this court the fact that New York State provides hearings on capacity to marry to minors who circumvented its law to marry, it would have been an issue fairly comprised in the petitioners' due process and equal protection claim to a hearing on capacity to marry. Supreme Court Rule 21.1(a); see Vance v. Tenazas, 444 U.S. 252, 258, note 5 (1980).

The kinds of issues the Supreme Court refuses to hear if not raised below are those which present separate and distinct questions far removed from the issues considered by the lower court. E.g., see, Singleton v. Wolf, 428 U.S. 106 (1976) in which the Supreme Court found that the Court of Appeals' resolution of the merits of a constitutional claim was inappropriate where the District Court had only issued a decision on the defendant's pre-answer motion to dismiss on the grounds of the plaintiffs' alleged lack of standing. But see Youakim v. Miller, 425 U.S. 231 (1976) in which the court considered the Supremacy Clause issue of whether a state statute conflicted with a federal statute when the only issue raised below was whether the state statute violated the Equal Protection Clause.

However, consideration of even questions not present in the petition for certiorari and not presented in the Court of Appeals is not beyond the Supreme Court's power and in appropriate circumstances the court has addressed them. Vance

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* Even if New York State did not afford hearings to minors who circumvent its law to marry, Cristina and Pedro would still have a valid due process and equal protection claim since their fundamental privacy right to freedom of choice in issues of family life is substantially infringed.

v. Tenazas, 444 U.S. 252, 258 note 5 (1980). A question of law will be considered even if not raised in either the Court of Appeals or the petition for certiorari if it is a "predicate to an intelligent resolution" of the question which was presented. Cuyler v. Sullivan, 446 U.S. 335, 342 note 6 (1980). At the very least, consideration of the fact that New York State provides minors who circumvent its laws a hearing on their capacity to mary is predicate to an intelligent resolution of whether the due process and equal protection rights of law abiding minors like Cristina and Pedro require a hearing on their capacity to marry and legitimate their child.

POINT II

THIS COURT SHOULD GRANT THE PETITION TO CONSIDER THE QUESTION OF WHETHER THE CLASS SHOULD INCLUDE ILLEGITIMATE CHILDREN WHOSE MINOR PARENTS HAVE BEEN DENIED ANY OPPORTUNITY TO DEMONSTRATE THEIR CAPACITY TO MARRY.

The interest of the infant children forced to bear the status of illegitimacy against their parents wishes should be fully considered in this case and they should therefore be included in the class represented before this court. Cristina and Pedro seek not only to represent the interests of minor parents who desire an opportunity to demonstate their capacity to marry but also their children forced into and burdened by the status of illegitimacy. The only way a child can be legitimate under New York State Law is if his parents marry. N.Y. Dom. Rel. Law §24 (McKinney 1977). It is indisputable that an illegitimate child would be better off socially and economically if legitimate. He would thus benefit from a process by which his parents could establish their capacity to marry when marriage is the only way the infant can be legitimated. Illegitimate children are disadvantaged. Illegitimate birth is a life long social stigma. New York State completely disregards the best interests of these innocent, helpless infants. The state allows each infant's present and future to depend solely

on the whim of one of his grandparents who has no responsibility for him. His parents, who care for and support him, are deprived of any opportunity to act in this best interests. Each infant has a constitutional interest in having some process by which his parents could demonstrate their sincere desire and capacity to marry and legitimate him.

Cristina and Pedro's child, Daniel, was not born when the class in this case was certified by the district court. His parents sought to marry before his birth so he would never have to be illegitimate. Cristina and Pedro are Daniel's guardians and as such can represent him and other infant children similarly situated in this case. Woe v. Matthews, 408 F. Supp. 419 (E.D.N.Y.) aff'd 512 F.2d 40 (2d Cir. 1977); Doe v. Lavine, 347 F. Supp. 357 (S.D.N.Y., 1972); Fed. Rl. Civ. Pro. 17(c).

Inclusion in the class of illegitimate infant children represented by Cristina and Pedro would satisfy the requirements of Fed. R. Civ. Pro. 23(a) and 23(b)(2). The constitutional claim presented on behalf of minor parents and their infant children is the same and Cristina and Pedro as parents advancing the same constitutional claim as their child will fairly and adequately protect the interests of all class members, parents and children alike. The claims of a representative and members of a putative class are typical if they arise, as they do here, from the same legal theory or if there is an absence of antagonism or conflicting interest between the class members. Jennings Oil Co., Inc. v. Mobil Oil Corp., 80 F.R.D. 124 (S.D.N.Y. 1978). Factual variation among class members does not destroy typicality. Leisner v. New York Telephone Co., 358 F. Supp. 359 (S.D.N.Y. 1973); Mendoza v. Lavine, 72 F.R.D. 520 (S.D.N.Y. 1976). Also the district court below found the numerousity requirement met, pointing out that there were over 10,000 out of wedlock children born in one year in New York City alone. (Opinion dated June 29, 1981, Appendix C to Petition, p. C-11). The respondents in refusing to grant

any opportunity for the interests of the minor parents and their children to be heard have acted on ground generally applicable to the class, and the relief, provision of such an opportunity, would be appropriate for the class as a whole, both children and parents.

In order to fully consider the impact of New York State Law and the interests of all involved this court should consider the inclusion in the class of the illegitimate children of minor parents.

CONCLUSION

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.*

Respectfully submitted

FRANK A. BRESS

Washington Square Legal Services, Inc.
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New York, New York 10011
(212) 924-3200

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* Petitioners have submitted a Brief in Opposition to Respondents Cross-Petition which addressed the issues raised by respondents in their Cross-Petition and inappropriately in their Brief in Opposition to the Petition.

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Respondents.

AFFIDAVIT OF SERVICE

JANET CALVO hereby duly sworn deposes and says:

1. I am of counsel to Frank Bress, attorney for petitioners, cross-respondents in this case. My office is at 80 Fifth Avenue, Room 1501, New York, New York 10011.

2. On June 4, 1982, I served copies of the Reply Brief in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit by depositing the same in a United States Post Office mailbox with first class postage prepaid, addressed to:

a. Honorable Robert Abrams, Attorney General of the State of New York, Two World Trade Center, New York, New York 10047, Robert J. Schack of Counsel, attorney for David Axelrod and

b. F. Schwartz, Corporation Counsel of the City of New York, 100 Church Street, New York 10007, attorney for David Dinkins.

JANET CALVO

Sworn to before me this
4th day of June, 1982

Notary Public

FRANK A. BRESS
Notary Public, State of New York
No. 31-4512283
Qualified in New York County
Term Expires March 30, 1983